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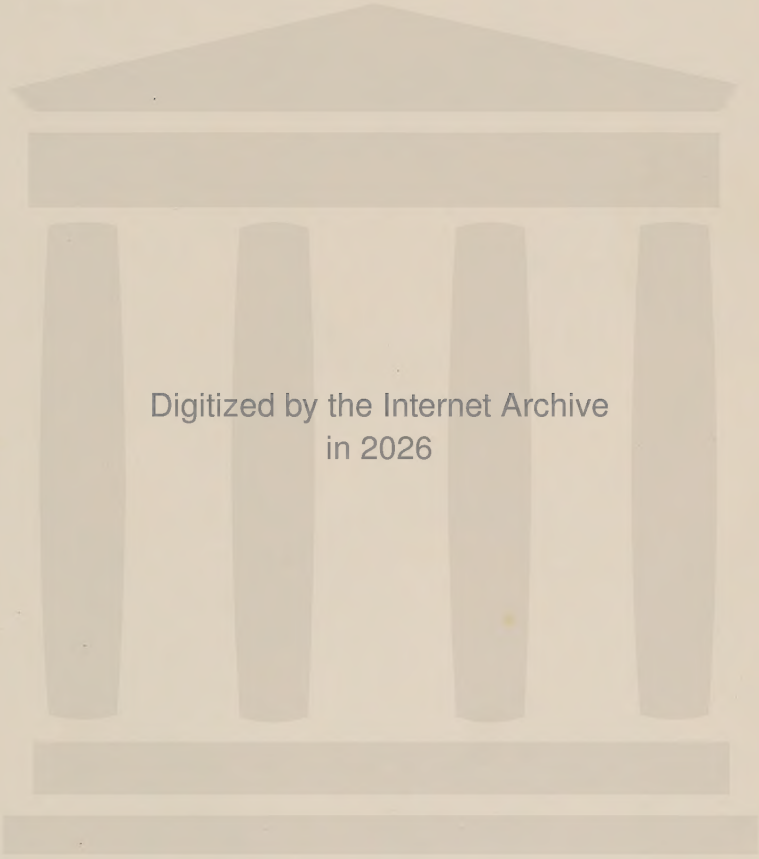
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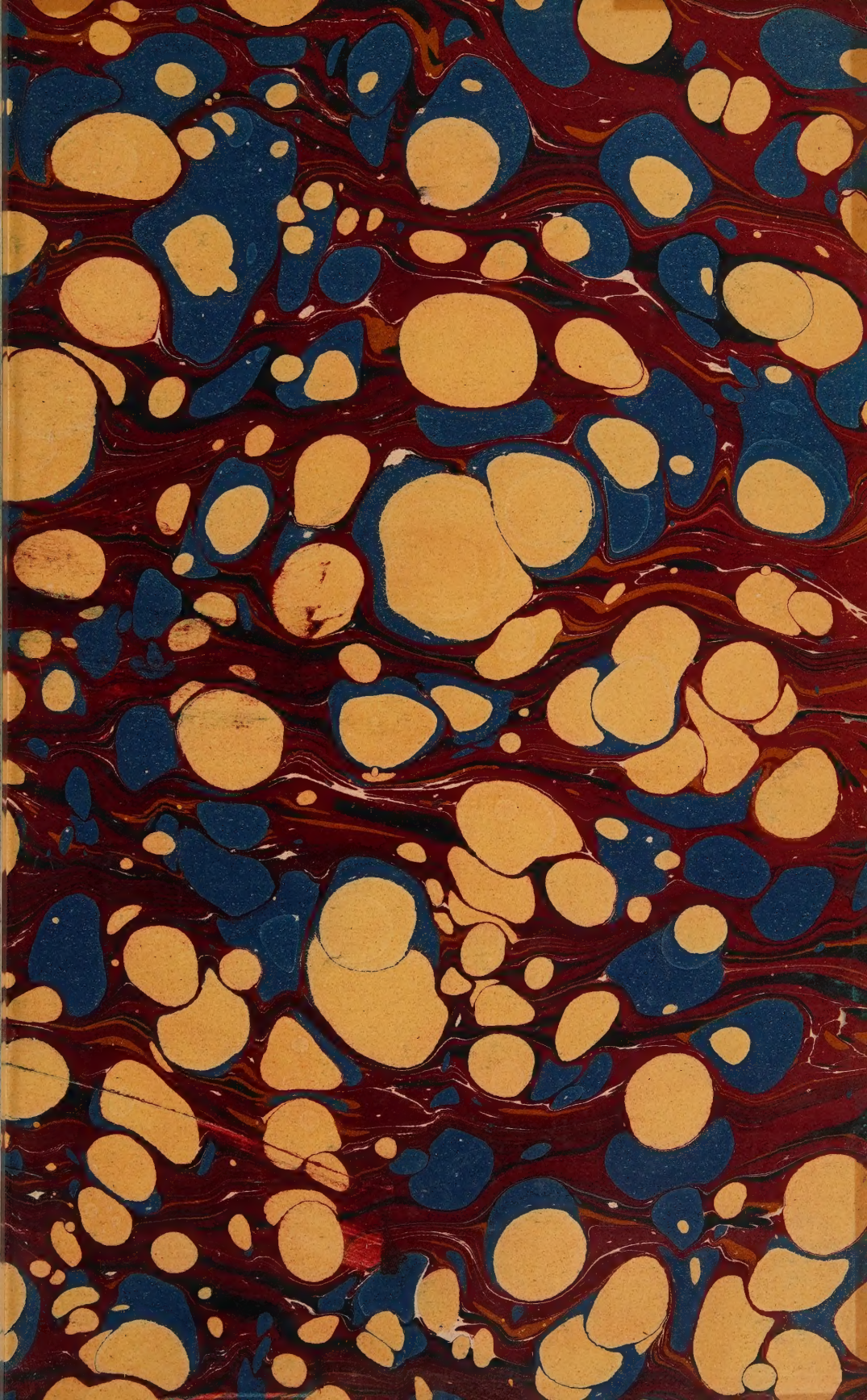

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1896.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

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MEMORANDA.

Jan. 8. The Right Honourable Lord Blackburn, *formerly a Lord of Appeal in Ordinary, died at his residence, Doonholm, Alloway, Ayrshire, at the age of* 82.

The Right Honourable Lord James of Hereford, *Chancellor of the Duchy of Lancaster, was in the month of February appointed a member of the Judicial Committee of the Privy Council.*

Sept. 21. The Right Honourable George Denman, *formerly one of the judges of the Queen's Bench Division of the High Court of Justice. died at his residence at Kensington at the age of* 76.

ERRATUM.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

FORD'S HOTEL COMPANY, LIMITED . APPELLANTS;

AND

BARTLETT . . . . . RESPONDENT.

H. L. (E.)
1895
Dec. 2.

Practice—Procedure—Arbitration—Stay of Proceedings—"Step in Proceedings"—Application for Extension of Time—Arbitration Act 1889 (52 & 53 *Vict. c.* 49) *s.* 4—*Appeal to House of Lords—Leave to Appeal—Supreme Court of Judicature (Procedure) Act* 1894 (57 & 58 *Vict. c.* 16) *s.* 1 *sub-s.* 1.

Where a defendant takes out a summons and obtains an order for further time for delivering his defence, he "takes a step in the proceedings" within the meaning of the Arbitration Act 1889 s. 4, and is not afterwards entitled to apply under that section for a stay on the ground that the proceedings were brought in respect of a matter agreed to be referred.

The decision of the Court of Appeal ([1895] 1 Q. B. 850) affirmed.

The Supreme Court of Judicature (Procedure) Act 1894 s. 1 sub-s. 1, which enacts that no appeal shall lie, without the leave of the judge or of the Court of Appeal, from certain interlocutory orders or judgments made by a judge, has no application to appeals to the House of Lords from the Court of Appeal, and does not affect the Appellate Jurisdiction Act 1876 s. 3.

THE respondent brought an action against the appellants for the price of work, &c., done under a building contract. The

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defendants thrice obtained the plaintiff's consent to further time for delivering their defence. Their fourth request being refused, the defendants took out a summons at chambers for one month's further time to deliver the defence, and the master made an order giving them fourteen days' further time. Afterwards they took out a summons for a stay of proceedings on the ground that all questions between the parties ought to be referred to arbitration under the 20th condition of the contract. An order for a stay was made by the master and affirmed by Collins J., who gave leave to appeal. The order for a stay was set aside by the Court of Appeal (Lopes and Rigby L.JJ.) (1) on the ground that the defendants had taken a "step in the proceedings" within the meaning of the Arbitration Act 1889 (52 & 53 Vict. c. 49) s. 4.

Sect. 4 says: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Nov. 29; Dec. 2. A preliminary objection to the hearing of this appeal was taken by

Edward Boyle (*Murphy Q.C.* with him), for the respondent on the ground that no leave to appeal to this House had been given by the Court of Appeal. No appeal lies to this House. By s. 1, sub-s. 1, of the Judicature (Procedure) Act 1894 (57 & 58 Vict. c. 16), no appeal, without the leave of the judge

(1) [1895] 1 Q. B. 850.

or of the Court of Appeal, lies from any interlocutory order or interlocutory judgment made by a judge, except in certain cases of which this is not one. This means, though it does not expressly say so, that leave to appeal must be given for appeals to this House in such matters, and the section by implication repeals s. 3 of the Appellate Jurisdiction Act 1876, which gives an appeal from any order or judgment of the Court of Appeal.

[THE HOUSE, without hearing counsel for the appellants, overruled the objection, and heard the appeal on the merits.]

C. Dodd Q.C. and *A. Statham* (*W. H. Nagle* with them), for the appellants. An application for further time to deliver a defence is not a "step in the proceedings" within s. 4 of the Arbitration Act 1889. A summons for further time does not waive an irregularity: *Hampden* v. *Wallis* (1); and cannot operate as a waiver of a party's right to elect whether he will apply to have the action referred. There is no statutory or other definition of the phrase "a step in the proceedings"; but it means some movement in advance, something done to fortify the position of the party, not a mere pause, such as a summons for time. By the rules a defendant has ten days for delivering his defence. It may be impossible for him to determine within the ten days whether the action ought to be referred—owing to the illness of the solicitor, the mass of details to be mastered, or many other causes. If the plaintiff will not consent to give further time the defendant must take out a summons—otherwise judgment. The Legislature cannot have intended such an injustice. A summons for leave to administer interrogatories may be a step: *Chappell* v. *North* (2); but there the party not only moves himself but compels his opponent to move. A notice requiring a statement of claim is not a step within the meaning of the Arbitration Act 1889: *Ives & Barker* v. *Willans*. (3) The obtaining extensions of time by consent are admittedly not steps: see *Brighton Marine Palace, &c.* v. *Woodhouse* (4), and dicta in other cases. There is nothing in

(1) 26 Ch. D. 746, 752.
(2) [1891] 2 Q. B. 252.
(3) [1894] 2 Ch. 478.
(4) [1893] 2 Ch. 486.

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the intervention of the Court to alter the principle. The Legislature no doubt intended to put a stop to the running up of costs, but that can be dealt with by making the defendant pay the costs wherever he ought. There is no more a waiver of the defendant's rights in a summons than in a consent. A "proceeding" means any stage in the action, per Jessel M.R. in *Richards* v. *Cullerne* (1), and a step in the proceedings is an advance from one stage to another. There is no decision upon the point contended for by the appellants, though there are adverse dicta in the three cases first cited.

[They also referred to *Spincer* v. *Watts* (2); *Rein* v. *Stein*. (3)]

Murphy Q.C. and *E. Boyle*, for the respondent, were not heard.

LORD HALSBURY L.C. My Lords, I think this is a very plain case, and we have had at least as much time occupied in its consideration as the matter deserves.

The words in the 4th section of the Arbitration Act 1889 which your Lordships have to construe are these, "before delivering any pleadings or taking any other steps in the proceedings." The defendants took out a summons in this form: "Let all parties concerned attend the master at chambers . . . . on the hearing of an application on the part of the defendants that they may have one month's further time to deliver defence herein." Upon this summons the master made an order that the defendants should have fourteen days' further time for delivering their defence. The sole question upon which we have been engaged so long is whether this is a "step in the proceedings." It seems to me that it is. I am not going to give any definition of what a "step in the proceedings" may be; it is enough for this case to say that this is a "step in the proceedings."

My Lords, there can be no doubt that what was in the mind of the Legislature was this—one of the great scandals which induced the Legislature to interfere by statutory provision was

(1) 7 Q. B. D. 623. (2) 23 Q. B. D. 350.
(3) 66 L. T. (N.S.) 470.

the delay, and another was the costs incurred, notwithstanding that the proceedings did not go on, so that there were a great number of proceedings for which the parties had to pay although they furnished no ultimate decision of their rights. The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should at once, and before any further proceedings were taken, specify the terminus a quo, and that if an application to stay proceedings was made under those circumstances, then that the Court should enforce the contractual obligation to go to arbitration. My Lords, that seems to me a very wise provision: that costs should not be thrown away in beginning to litigate.

My Lords, I have designedly avoided saying anything about the other point which one of the appellants' counsel attempted to argue, namely, that, independently of the Act of 1889, the Court has an inherent jurisdiction to stay proceedings in an action. Nothing appears to me more mischievous as a precedent than, when a case of this sort involving a question simply upon procedure is taken and appealed from court to court on one ground, for the parties when they come before the last Court of Appeal to attempt to raise a question dependent on wholly different grounds, and one which has not been considered by any one of the learned judges before whom the case came. Under these circumstances I apprehend your Lordships will not think it right to consider such a point at all. Confining ourselves to the one point which has been litigated here, I entertain no doubt whatever that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. My Lords, I am of the same opinion. The only question raised by this appeal is an exceedingly small one, and in my opinion it has been rightly decided by the learned judges in the Appeal Court. I see no reason to doubt that an order obtained upon a summons for extension of time for delivery of defence is a "step in the proceedings" by the defendant within the meaning of s. 4 of the Arbitration Act.

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FORD'S HOTEL COMPANY v. BARTLETT.

LORD MACNAGHTEN. My Lords, I am entirely of the same opinion.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I am also of opinion that the application by the appellants for an extension of time to deliver their defence, upon which an order giving fourteen days was obtained, was a step in the proceedings. The proceeding in question was unlike that in the cases which have been mentioned, where agents without coming into court at all had given an extra judicial and voluntary consent, because the proceeding took place judicially in chambers, which was the same as if in Court. The proceeding of presenting such a summons and supporting it before the master was unquestionably judicial and implied a statement to the effect that the appellants were to defend the action. It was on that representation only that the Order of Court was obtained. Having regard to the provisions of the arbitration statute this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration. On these grounds I am of opinion with your Lordships that the appellants' summons, with what followed on it, was a step in the proceedings, and that the judgment of the Court of Appeal ought to be affirmed.

LORD DAVEY. My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 2, 1895.

Solicitors for appellants: *W. L. Cooper, for Morgan & Co., Chepstow.*

Solicitors for respondent: *Munns & Longden.*

[HOUSE OF LORDS.]

ANNA TREGO AND WILLIAM WILSON SMITH . . . . . } APPELLANTS;

AND

GEORGE STRATFORD HUNT . . . RESPONDENT.

H. L. (E.) 1895 Dec. 5.

Goodwill—Sale of Goodwill—Canvassing old Customers—Partnership.

Where the goodwill of a business is sold (without further provision), the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser.

The same principle is applicable to the case where a person has been taken into partnership on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner.

Labouchere v. *Dawson* (L. R. 13 Eq. 322) approved.

The reasoning in *Pearson* v. *Pearson* (27 Ch. D. 145) overruled.

The decision of the Court of Appeal ([1895] 1 Ch. 462) reversed, and an injunction granted on the principle stated above.

For some years prior to 1876 William Henry Trego, the husband of the appellant Anna Trego, had carried on business as a varnish and japan manufacturer at Bow and in London under the name of Tabor, Trego & Co. In 1876 he took the respondent into partnership, but upon the terms that the goodwill of the business should be and remain the sole property of William Henry Trego. The partnership continued till his death in 1888. In February 1889 a partnership agreement was made between the appellants and the respondent that they should carry on the business under the old style of Tabor, Trego & Co. for a term of seven years, computed from January 1 1889. The agreement provided that the goodwill should nevertheless be and remain the sole property of Anna Trego. In December 1894 the appellants found that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. The respondent admitted that his object in having

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the list made was to acquire information which would enable him, when the partnership expired, to canvass these persons, and to endeavour to obtain their custom for himself. The appellants accordingly brought this action, and moved for an injunction to restrain the respondent from making any copy of or extract from the partnership books for any purpose other than the purposes of the partnership business. Stirling J. made no order, and this decision was affirmed by the Court of Appeal (Lord Halsbury, Lindley and A. L. Smith L.JJ.) (1)

1895. June 25, 27, 28. *Hastings Q.C.* and *Cozens-Hardy Q.C.* (*Leigh Clare* with them) for the appellants. The large question raised by this appeal is whether the decision in *Labouchere* v. *Dawson* (2) is good law. It may be, as has been said, that that decision went further than the prior authorities. That does not prove it to be unsound, and on principle it should be upheld as in accordance with good sense and the general view of business men. It is repugnant to fair and honest dealing that a man should sell the goodwill of a business—that is the connection of the business with its old customers—and immediately deprive the purchaser of the value of that connection by inducing the customers to desert the purchaser and deal with himself. Such conduct is inequitable and a fraud on the contract. This House is therefore asked to overrule *Pearson* v. *Pearson* (3) or as much of it as overruled *Labouchere* v. *Dawson*. (2) In those two cases the authorities are discussed, and the arguments in favour of and against the present appellants' contention clearly stated.

Labouchere v. *Dawson* (2) was approved and extended by Jessel M.R. in *Ginesi* v. *Cooper* (4); and, though the extension was overruled in *Leggott* v. *Barrett* (5), the majority of the Court of Appeal did not disapprove an injunction to restrain the retiring partner from soliciting old customers, though they would not restrain him from dealing with them. *Labouchere* v. *Dawson* (2) was approved by the majority of the Court of

(1) [1895] 1 Ch. 462.
(2) L. R. 13 Eq. 322.
(3) 27 Ch. D. 145.
(4) 14 Ch. D. 596.
(5) 15 Ch. D. 306.

Appeal in *Walker* v. *Mottram* (1) (though Baggallay L.J. doubted it), and its principle was adopted by Fry J. in *Mogford* v. *Courtenay*. (2) In *Churton* v. *Douglas* (3) Wood V.-C. gives a wider definition of "goodwill" than Lord Eldon's words imply in *Shackle* v. *Baker* (4); *Cruttwell* v. *Lye* (5); and *Kennedy* v. *Lee*. (6) But even those cases are not against the appellants, for they admit the principle that a fraud on the contract would be restrained.

[They also cited *Cook* v. *Collingridge* (7); *Johnson* v. *Helleley*. (8)]

Sir R. E. Webster Q.C. and *Buckley Q.C.* (*George Henderson* with them). The question turns upon the meaning to be assigned to "goodwill." Lord Eldon in *Cruttwell* v. *Lye* (9) defines it as "nothing more than the probability that the old customers will resort to the old place." No doubt the sale of the goodwill of a business imposes some restriction on the vendor: he must not, *e.g.*, represent himself as the old firm, or use a trade name of the old firm. But *Labouchere* v. *Dawson* (10) rests on a doctrine which cannot be wholly accepted, and it is difficult to reconcile that decision with admitted propositions. It is admitted that a vendor might set up in business next door to the old premises, and publicly advertise the business. Yet in so doing he would certainly be depreciating—possibly destroying—what he had sold. The rights of an outgoing partner ought not to be restricted by implication; and if canvassing is to be prohibited, it must be by direct agreement. The purchaser, or the partner who remains, can protect himself by express provision; if he does not, he cannot complain of hardship. In the absence of express provision, it is impossible to say where the line ought to be drawn. There is no logical standpoint between preventing the vendor from trading at all as a rival (which it is admitted cannot now be done), and allowing him to canvass the old customers. The weight of authority is in

(1) 19 Ch. D. 355.
(2) 29 W. R. 864.
(3) Joh. 174, 188.
(4) 14 Ves. 468.
(5) 17 Ves. 335.
(6) 3 Mer. at p. 452.
(7) Collyer on Partnership, 2nd ed. 215; the decree is also printed in 27 Beav. 456.
(8) 2 D. J. & S. 446.
(9) 17 Ves. 335, 346.
(10) L. R. 13 Eq. 322.

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favour of the respondent. In Lord Eldon's final judgment in *Cruttwell* v. *Lye* (1) "direct solicitation" was found, and yet the injunction was refused. In *Dawson* v. *Beeson* (2) an expelled partner who had been refused his share of capital was not restrained from carrying on the business for himself, and soliciting the old customers of the firm: and see *Hall* v. *Barrows*. (3)

[They also contended that the decisions of Stirling J. and the Court of Appeal were right on the ground that a partner was entitled to make copies and extracts from the partnership books, whatever use he might ultimately make of them, and that those decisions ought therefore to be affirmed, whatever view this House might take of the larger question raised by the appeal.]

Cozens Hardy Q.C. in reply, said that the appellants would be content with an injunction restraining the respondent from soliciting the old customers, such as was granted in *Labouchere* v. *Dawson* (4), mutatis mutandis.

The House took time for consideration.

Dec. 5. LORD HERSCHELL. My Lords, a very important question which has given rise to much difference of judicial opinion presents itself for decision in the present case. [His Lordship stated the facts set forth above, and continued:—]

Stirling J., in the course of his judgment, said: "It has been admitted in the argument, and for the purposes of it, that the defendant intends, in the event of the partnership coming to an end at the beginning of next year, to use this list for the purpose of soliciting the customers of the present firm. He proposes then to engage in a business of a similar nature to that carried on by the firm, and the question which I have to decide is whether he is entitled to make such a use of the list."

It seems clear, therefore, that the point in contest before the learned judge who heard this motion was whether the respondent was entitled to make use of the list of the customers of the firm which he had obtained in order to canvass them

(1) 17 Ves. at p. 345.
(2) 22 Ch. D. 504.
(3) 4 D. J. & S. 150.
(4) L. R. 13 Eq. 322.

when he started business on his own account. I mention this because it may have been open to contention on behalf of the respondent that he was at all events entitled, whilst he remained a partner, to make copies of the partnership books, and that it was premature to come to the Court to restrain the use of these copies even if he were not entitled when he ceased to be a partner to canvass the customers of the firm; but in view of the fact that the respondent threatened to use the list for the purpose of canvassing the persons named therein, and having regard to the course taken before the learned judge, I think it would have been open to him to grant an injunction, though not in the terms prayed for, if the canvassing of those customers would be a wrongful act on the part of the respondent.

Stirling J. and the Court of Appeal had, I think, no alternative but to refuse to grant any injunction. They were bound by the decision of the Court of Appeal in the case of *Pearson* v. *Pearson* (1) that, even though the goodwill belongs to one of the partners, it is lawful for the other, on the termination of the partnership, to canvass the customers of the firm. Consistently with that decision, I think it would have been impossible to hold that the appellants were entitled to an injunction. That case is, however, open to review by your Lordships, and the real question in the present case is whether it was well decided.

The question whether a person who had sold the goodwill of his business was entitled afterwards to canvass the customers of that business came first before the Courts for decision in the case of *Labouchere* v. *Dawson*. (2) Lord Romilly M.R. answered in the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveller, to go to any one who was a customer of the firm and to solicit him not to continue business with the old firm but to transfer it to him; that this was not a fair and reasonable thing to do after he had sold the goodwill. He accordingly granted an injunction to restrain the defendant, his partners, servants, or agents from applying to any person

(1) 27 Ch. D. 145. (2) L. R. 13 Eq. 322.

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who was a customer of the old firm prior to the date of the sale, privately, by letter, personally, or by a traveller, asking such customers to continue to deal with the defendant or not to deal with the plaintiffs.

In the case of *Ginesi* v. *Cooper* (1), Sir George Jessel M.R. followed the decision in *Labouchere* v. *Dawson* (2), and expressed in very strong terms his concurrence with it. He granted an injunction restraining the defendants, their clerks, servants, agents, workmen, or others, from soliciting or in any way endeavouring to obtain the custom of or orders for goods similar in character to those dealt in by the old firm from such of the customers as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff. This was all the plaintiff in that case asked for; but the learned judge went further, and expressed a strong opinion that a man who sold the goodwill of his business must not only refrain from soliciting the old customers to deal with him, but must not deal with them. It was not, he said, necessary to decide it on that occasion; but he stated it because he thought what the meaning of selling the goodwill of a trade or business is should be thoroughly understood.

In the case of *Leggott* v. *Barrett* (3), which came before the same learned judge shortly afterwards, he acted upon the same view, and extended the injunction to restrain the defendant from dealing with the customers of the old firm. From this judgment there was an appeal; but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. He made no objection to the injunction so far as it restrained him from canvassing those customers. The Court of Appeal dissolved that part of the injunction of which the appellant complained. They thought they could not on any just principle prevent the defendant from supplying a man with goods if he applied for them; that there was no implied obligation upon him, either legal or moral, to shut his door against a customer who came to him of his own free will; that a sale of goodwill did not

(1) 14 Ch. D. 596. (2) L. R. 13 Eq. 322.
(3) 15 Ch. D. 306.

involve an implied contract not to deal with any customers of the old business the goodwill of which was sold. The case is chiefly important for present purposes, in so far as it discloses the view taken by the learned judges, who on that occasion constituted the Court of Appeal, on the point now under consideration.

In the case of *Pearson* v. *Pearson* (1), to which I shall have occasion to refer immediately, Cotton L.J. stated that the decision in *Labouchere* v. *Dawson* (2) was doubted in *Leggott* v. *Barrett* (3) by James L.J. and himself. This is no doubt correct so far as Cotton L.J. is concerned; but I am unable to find any very clear indication that this was the view of James L.J. It is quite true that in an early part of his judgment he said: "I do not like going much into the case, because what I should say might perhaps be considered to mean that the injunction which is submitted to is too wide." But in a later part of the judgment he says: "At first it did appear to me that we might, from the equitable view of the case, say that the defendant shall be prevented from dealing with any customer or customers whom he had solicited; but it appeared to me that that was too vague and too wide." He pointed out that a man might give the order afterwards without any reference to previous solicitation. Further on, when discussing the effect of the agreement, and shewing that there was no implied obligation not to deal with the customer, he says: "It means that you are not to solicit customers." The impression produced upon my mind by the whole of the judgment is that the learned judge had not arrived at the conclusion that *Labouchere* v. *Dawson* (2) was wrong. Brett L.J. expressed a decided approval of that decision. He was of opinion that, on the sale of a goodwill for a valuable consideration, there was an implied contract that the vendor would not solicit former customers, who were really the people who formed the goodwill.

The next case in which the matter was brought under the consideration of the Court of Appeal was that of *Walker* v. *Mottram*. (4) In that case the goodwill of the business carried

(1) 27 Ch. D. 145.
(2) L. R. 13 Eq. 322.
(3) 15 Ch. D. 306.
(4) 19 Ch. D. 355.

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on by a bankrupt had been sold by his trustees in bankruptcy. It was sought afterwards to restrain the bankrupt from soliciting the customers of that business. Sir George Jessel M.R. refused to grant an injunction, on the ground that the doctrine laid down in *Labouchere* v. *Dawson* (1) did not apply to the case of a bankrupt whose business had been sold by his trustees. This judgment was affirmed by the Court of Appeal. Of the Lords Justices who then constituted the Court, Baggallay L.J. expressed a strong doubt as to the correctness of the decision in *Labouchere* v. *Dawson*. (1) He said that it appeared to him as at present advised that it went far beyond what any of the previous decisions would have sanctioned. Lush and Lindley L.JJ., the other members of the Court, said that the rule laid down in *Labouchere* v. *Dawson* (1) had, it was believed, been recognised and acted upon in practice, and, whatever else might be said of it, the rule was in accordance with the general opinion of what was fair and right, and was easily applied.

In the case of *Pearson* v. *Pearson* (2) the question came again before the Court of Appeal. The facts were there less favourable to the plaintiff than in the case of *Labouchere* v. *Dawson* (1), and Baggallay and Lindley L.JJ. both considered that, even if *Labouchere* v. *Dawson* (1) was rightly decided, the case then before them was not governed by it. Baggallay and Cotton L.JJ., however, distinctly rested their judgments on the ground that the decision in *Labouchere* v. *Dawson* (1) was wrong and ought to be overruled. Lindley L.J., on the other hand, was of opinion that it was rightly decided. The reason of Baggallay L.J. for dissenting from *Labouchere* v. *Dawson* (1), so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher Court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere* v. *Dawson* (1) went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shewn that it was in conflict with the principles involved in those earlier decisions. Cotton L.J. examined the earlier decisions, and

(1) L. R. 13 Eq. 322. (2) 27 Ch. D. 145.

arrived at the conclusion that Lord Eldon was against the notion that the vendor of the goodwill of a business was, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the goodwill. The learned Lord Justice pointed out that Lord Romilly rested his decision in *Labouchere* v. *Dawson* (1) on the principle that a man could not derogate from his grant. "But," he said, "it is admitted that a person who has sold the goodwill of his business may set up a similar business next door and say that he is the person who carried on the old business; yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'goodwill' as would give a right to such an injunction as has been granted in the present case."

I propose now to examine the older authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere* v. *Dawson*. (1) It no doubt went beyond them, inasmuch as it dealt with a question not determined by them; but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Cruttwell* v. *Lye* (2), before Lord Eldon. The business of a bankrupt, who was a carrier between Bristol and London, had been sold by his assignees in bankruptcy. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath and London; but though the termini were the same the route employed was different. He addressed direct solicitation to the public for the carriage of their goods, stating that he had been reinstated in his business; and there was further, in the opinion of the Lord Chancellor, so much probability of direct solicitation to the customers of the old concern, in some few instances, that the fact might fairly be assumed. Under these circumstances the purchaser of the bankrupt's business applied for an

(1) L. R. 13 Eq. 322. (2) 17 Ves. 335, 346.

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injunction. The case was therefore the same as *Walker* v. *Mottram* (1), where Sir George Jessel—than whom no one has more strongly insisted upon the propriety of the decision in *Labouchere* v. *Dawson* (2)—was of opinion that no injunction should be granted. The bankrupt was no party to the contract of sale; there could therefore be no implied contract on his part to be derived from it. It is most material also to observe what was the nature of the injunction then in question. It was whether the bankrupt was to be restrained from carrying on the trade which he was pursuing of carrying goods between Bristol, Bath and London. The Lord Chancellor held that he could not be so restrained; and I think it must now be taken as settled that the sale of the goodwill of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. But Lord Eldon certainly did not decide that such a vendor was entitled to solicit the customers of the old firm. He was not asked for an injunction to restrain the defendant from so doing. It was sufficient for the decision of that case that, in the opinion of the Lord Chancellor, there was no principle arising out of the provisions of the bankruptcy law upon which the Court could hold that the bankrupt ought not to engage in the same trade and by the same road as before; though I think that, so far, the opinion of the Lord Chancellor would have been the same if the sale of the business had been effected by the bankrupt himself and not by his assignees.

The importance of the case consists in the definition which Lord Eldon gave of the goodwill there sold. He said: "The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage, I should, by interposing carry the effect of injunction to a much greater length than any decision has authorised or imagination ever suggested." These observations

(1) 19 Ch. D. 355. (2) L. R. 13 Eq. 322.

were much relied on by Cotton L.J. in *Pearson* v. *Pearson*. (1) If the language of Lord Eldon is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition.

"'Goodwill,' I apprehend," said Wood V.-C. in *Churton* v. *Douglas* (2), "must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The learned Vice-Chancellor pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted the public are mindful whether it is carried on in Fleet Street or in the Strand.

The question, what is meant by "goodwill," is, no doubt, a critical one. Sir George Jessel, discussing in *Ginesi* v. *Cooper* (3) the language of Wood V.-C. which I have just quoted, said: "Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill." He pointed out that, in the case before him, the connection had been formed by years of work. The members of the firm knew where to sell the stone, and he asks: "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?"

The present Master of the Rolls took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes

(1) 27 Ch. D. 145. (2) Joh. 174, 188.
(3) 14 Ch. D. 596.

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the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment. What obligations then does the sale of the goodwill of a business impose upon the vendor? I do not think they would necessarily be the same under all circumstances.

In *Cook* v. *Collingridge* (1) Lord Chancellor Eldon had to determine what orders were to be given where a partnership had expired by effluxion of time, and where the goodwill had to be valued. He declared that there existed no obligation upon the partners to restrain them from carrying on the same trade, or any of them wanting to do so; that a claim to have an estimated value put upon any subject that could be considered as described by the term "goodwill" could not be supported upon the same grounds or principles as those upon which a value was received from a partner buying the share of the partner going out of the business and retiring from the trade altogether. He thought that all that could be valued was the chance of the customers adhering to the old establishment, notwithstanding that the previous partners or any of them carried on a similar business elsewhere.

In *Johnson* v. *Helleley* (2) a bill was filed by the surviving partner to wind up the business of the partnership. The usual decree was made. The chief clerk certified that it was most beneficial that the business should be sold as a going concern. The Master of the Rolls ordered it to be stated in the advertisement and particulars that the surviving partner would be at liberty to continue carrying on the business of a wine merchant in the same town and place. This judgment was affirmed by the Lords Justices.

In *Hall* v. *Barrows* (3) Lord Chancellor Westbury said: "I

(1) Collyer on Partnership, 2nd ed. 215; 27 Beav. 456.

(2) 2 D. J. & S. 446.

(3) 4 D. J. & S. 150.

think the direction to value the goodwill should be accompanied by a declaration defining what is meant by it, at least negatively; that is to say, a declaration that the goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business." In cases of this description, where a partnership has been dissolved by effluxion of time or death, the goodwill is regarded as a part of the assets, and subject therefore to realization on winding up the partnership; but it would obviously be absurd that because a partnership becomes thus dissolved those who formerly constituted the firm, or the survivors thereof, where the dissolution has been due to death, should thereafter be restrained from carrying on what trade they pleased. Whatever restriction the sale of the goodwill may impose, it is clear that in this class of cases it could not extend to prevent the former partners carrying on a similar trade to that in which they were previously engaged. It is noteworthy that in *Johnson* v. *Helleley* (1) it was thought necessary to warn intending purchasers that, though the goodwill was being sold, one of the persons who had previously carried on the business might continue to trade in the same town; and Lord Westbury thought it necessary to give the same warning to the person who was to value the goodwill in *Hall* v. *Barrows*. (2)

These circumstances appear to me to afford an indication that the Courts recognised that their view of what was meant by "goodwill" and the effect of a sale of it differed from the popular conception. Where the goodwill of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now,

(1) 2 D. J. & S. 446. (2) 4 D. J. & S. 150.

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however, too late to make any such distinction. I think it must be treated as settled that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business. This is really the strong point in the position of those who maintain that *Labouchere* v. *Dawson* (1) was wrongly decided. Cotton L.J. says: "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door and say that he is the person who carried on the old business. Yet such proceedings manifestly tend to prevent the old customers from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so?" I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet possible to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill and an endeavour to destroy it. If a person who has previously been a partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged.

(1) L. R. 13 Eq. 322.

But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business, but this in many cases appears to me of little importance, and of small practical advantage, if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in the terms employed in *Labouchere* v. *Dawson* (1), there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not. In several cases such injunctions were granted, and there is nothing to shew that any practical difficulty arose in enforcing them. It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity. I have so far dealt with the case as if the goodwill had been sold, but I think the rights and obligations must be precisely the same for present purposes when, on the creation of a partnership, it has been agreed that the goodwill shall belong exclusively to one of the partners.

For these reasons I think the judgment must be reversed and that an injunction should be granted in the form adopted in *Labouchere* v. *Dawson* (1), with the modification rendered necessary by the circumstance that here the partnership has not yet expired.

Under the very peculiar circumstances I think that no costs should be given here or in the Court of Appeal.

(1) L. R. 13 Eq. 322.

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LORD MACNAGHTEN. My Lords, the question for the House to determine is this: Is a person who has sold the goodwill of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that the goodwill shall belong solely to his partner, at liberty after the sale or the expiration of the partnership (as the case may be) to solicit the old customers of the business? There can be no difference in principle between the two cases. In 1872 Lord Romilly M.R. decided the question in the negative in *Labouchere* v. *Dawson*. (1) In 1884 the question was determined the other way by the Court of Appeal in *Pearson* v. *Pearson* (2); and *Labouchere* v. *Dawson* (1) was overruled by Baggallay and Cotton L.JJ., differing from Lindley L.J., who thought Lord Romilly's decision right. In *Labouchere* v. *Dawson* (1) the question arose out of a sale of goodwill. In the present case there is a subsisting partnership between the appellants and the respondent in the business of varnish manufacturers. One of the terms of the partnership is that the goodwill "shall be and remain the sole property" of the appellant, Anna Trego. The partnership will expire on January 1, 1896. The business is extremely lucrative: the connection very large. The respondent is, or was when this action was commenced, employing one of the clerks in copying out the names and addresses of the customers with the avowed intention of soliciting their custom as soon as the partnership expires.

The object of the action was to obtain an injunction to restrain this proceeding on the part of the respondent. It is not necessary to consider whether the action at the outset was or was not open to objection on technical or other grounds, for this much, at least, is to be said in favour of the respondent, that he met the case fairly and frankly from the very first, without any attempt to embarrass the plaintiff or to conceal his own object. His defence was—"The law allows it."

After the observations of my noble and learned friend on the woolsack (Lord Herschell) I do not think it necessary to deal with the question at any length. The arguments on the one side and on the other are summed up in *Labouchere* v.

(1) L. R. 13 Eq. 322. (2) 27 Ch. D. 145.

Dawson (1) and *Pearson* v. *Pearson* (2), and little remains but to choose between the conflicting views of very eminent lawyers. Nor do I think it necessary to do more than allude to the case in which Sir George Jessel M.R. held that a person who had sold the goodwill of his business could not even deal with his former customers. There, I think, the Master of the Rolls went too far. The decision trenched on the rights of the public. On the other hand, the Master of the Rolls was clearly right in refusing to extend the principle of *Labouchere* v. *Dawson* (1) to a sale in bankruptcy. There is all the difference in the world between the case of a man who sells what belongs to himself, and receives the consideration, and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee.

"A person not a lawyer," said Plumer V.-C. in *Harrison* v. *Gardner* (3) in 1817, "would not imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and honest understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to shew that the sale of a goodwill does not import restraint, and that a person selling the goodwill of a business for however large a consideration is not prevented setting up the trade." In that case, as it happened, there were other circumstances indicating bad faith, and on that special ground the Vice-Chancellor granted an injunction.

I agree, in substance, with the observations which I have quoted from the judgment in *Harrison* v. *Gardner*. (3) What "goodwill" means must depend on the character and nature of the business to which it is attached. Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell* v. *Lye* (4), where he says: "the goodwill which has been the subject of

(1) L. R. 13 Eq. 322.
(2) 27 Ch. D. 145.
(3) 2 Madd. at p. 219.
(4) 17 Ves. 335, 346.

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sale is nothing more than the probability that the old customers will resort to the old place." Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money. I do not think that "a person not a lawyer," to use the Vice-Chancellor's phrase, would suppose that a man might sell the goodwill of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities, which it is now too late to question, undoubtedly shew that a man who has sold the goodwill of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. Courts of Equity could not of course enforce even in a modified form and within reasonable limits an agreement express or implied which the law would have held void on the ground of public policy; nor could they treat the mere non-observance of such an agreement as fraudulent or inequitable. And so it has resulted that a person who sells the goodwill of his business is under no obligation to retire from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage-ground of his former position, moving under cover of a con-

nection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not I think to be excused by any maxim of public policy. Is it conceivable that the respondent would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations for a partnership were pending? It was said that you cannot draw the line; but I think the line may be drawn at this point. It is quite true that you cannot protect the purchaser completely. With Lindley L.J. I am disposed to regret it. It is quite true that it would be better that the purchaser should protect himself by taking apt covenants from the person with whom he is dealing. But this, I think, is rather a counsel of perfection than a reason for leaving the purchaser entirely at the mercy of the vendor.

The principle on which *Labouchere* v. *Dawson* (1) rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of goodwill, that the vendor does not solicit the custom which he has parted with: it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own.

I am of opinion that the appellants are entitled to judgment.

LORD DAVEY. My Lords, this appeal comes before your Lordships in a somewhat unsatisfactory form. The plaintiffs and the defendant are partners together for a term which will expire on January 1, 1896. On the expiration of the partnership the goodwill of the trade or business will be the sole

(1) L. R. 13 Eq. 322.

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property of the plaintiff, Anna Trego. The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion the relief asked was misconceived. As well under the general law as under the express provision of the articles of partnership, the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained, which would be restrained.

In my opinion the plaintiffs have no right to prevent the defendant from making any extracts from the books he thinks fit. Indeed, in the present case, as was observed at the bar, the list of the creditors of the firm would be of service to the defendant if the law as laid down in *Labouchere* v. *Dawson* (1) be maintained, in order to enable him to know whom he may not solicit, and to keep himself within the law. It was, however, admitted that the defendant intends, after the expiration of the partnership, to set up a business on his own account similar to that carried on by his firm, and he claims the right, if he thinks fit to do so, to solicit custom for his own business from the customers of his present firm. The question which has been argued before your Lordships is, whether he has any such right. Upon this question there has been a remarkable difference of judicial opinion.

The defendant has contracted for valuable consideration that, at the expiration of the partnership, the goodwill shall belong to the plaintiff, Anna Trego. To the lay mind it would undoubtedly seem a remarkable state of the law that a person who has entered into such a contract should be at liberty to go to the customers of the old firm and solicit them not to deal with the plaintiff, but to deal with him, and thus endeavour to secure for himself the business connection which he has contracted

(1) L. R. 13 Eq. 322.

shall belong to the plaintiff. But it would probably seem to the lay mind equally remarkable that a man who has sold a business and goodwill to another should be at liberty to set up a similar business on his own account in the same street, next door, or opposite to the premises on which the business he has sold was and is carried on; nay, more, that he may advertise himself as having been a partner in or the founder or manager of the business which he has sold, provided he does not represent that the business which he is carrying on is the same business as or identical with that which he has sold. Yet it is well settled that he may do all this.

It has been established by a series of cases that in the sale of a goodwill or business no covenant is implied that the vendor will not start a new business in opposition to the purchaser of the old business. It is enough to refer to *Cruttwell* v. *Lye* (1), *Churton* v. *Douglas* (2); *Johnson* v. *Helleley* (3); and the dicta in *Hookham* v. *Pottage*. (4) An express covenant not to carry on business would be incapable of being enforced as a restraint of trade if it was larger than the necessity of the case, having regard to the particular character of the business, demanded, or, perhaps, unless it was restricted in some way either in time or space. It seems to follow that a general covenant not to carry on business in competition with the purchaser, which would be invalid if expressed, cannot be implied.

I think it is to be gathered from dicta and expressions used by learned judges in the Court of Chancery that the idea of goodwill and what is comprised in the sale of a business has silently been developed and grown since the days of Lord Eldon, who, in one passage of his judgment in *Cruttwell* v. *Lye* (1), seemed to regard goodwill as only the habit of customers to resort to the old premises.

In *Labouchere* v. *Dawson* (1872) (5), Lord Romilly granted an injunction against the vendor of the goodwill of a brewery from applying to any person who was a customer of the old firm prior to the date of the sale "privately, by letter, personally, or

(1) 17 Ves. 335.
(2) Joh. 174.
(3) 2 D. J. & S. 446.
(4) L. R. 8 Ch. 91.
(5) L. R. 13 Eq. 322.

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by a traveller, asking such customer to continue to deal with the vendor, or not to deal with the purchasers." The judgment was based on the principle that a man cannot derogate from his own grant; that he cannot sell a thing and destroy the value of it. It was admitted in the judgment that a man may solicit customers in any public manner he pleased.

It is agreed on all hands that the decision in *Labouchere* v. *Dawson* (1) went considerably beyond the cases relating to goodwill decided before that time. In *Ginesi* v. *Cooper* (2) Sir George Jessel expressed himself as prepared to extend the injunction so as to prohibit the vendor from dealing with the customers, and in *Leggott* v. *Barrett* (3) he granted an injunction to that effect; but that part of the order was reversed in the Court of Appeal, and I understand that no such order is now asked for at the bar. I may remark, in passing, that the injunction in *Ginesi* v. *Cooper* (2) went far beyond the order in *Labouchere* v. *Dawson* (1), and to an extent which, in my opinion, cannot be supported. It restrained the defendant "from in any way endeavouring to obtain the custom of such of the customers of the plaintiff as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff." This form of order would prevent the defendant from issuing public advertisements, or carrying on business in competition with the plaintiff as it is admitted he may do.

In the case of *Leggott* v. *Barrett* (3) there was no appeal against that part of the order which simply followed *Labouchere* v. *Dawson*. (1) It was therefore unnecessary for the Court to express any opinion upon it. The present Master of the Rolls, however, expressed his approval of the doctrine. James and Cotton L.JJ. did not express any approval of it, and I think it may be inferred from the judgments that Cotton L.J. certainly, and James L.J. possibly, were not prepared to do so. In *Pearson* v. *Pearson* (4) Baggallay and Cotton L.JJ. expressed their dissent from *Labouchere* v. *Dawson* (1), and overruled it,

(1) L. R. 13 Eq. 322.
(2) 14 Ch. D. 596.
(3) 15 Ch. D. 306.
(4) 27 Ch. D. 145.

while Lindley L.J. expressed his approval of it. This is in substance an appeal from *Pearson* v. *Pearson.* (1)

On the argument of this case at your Lordships' bar, it certainly appeared to me that the logical result of the principle upon which I understand the case of *Labouchere* v. *Dawson* (2) to be founded would be to restrain the vendor of the goodwill of a business from carrying on business in competition with the purchaser at all. Your Lordships were not asked to take that course. And, having regard to the well-established doctrine against restraint of trade, it would be impossible, as I have already said, to imply such a general covenant. I doubted whether it was right, if you allowed the vendor to trade in competition, to impose fetters upon him which might prevent his doing so effectually or successfully. I was also struck with the vagueness and difficulty of applying the injunction as granted in *Labouchere* v. *Dawson.* (2) Questions may arise as to the persons to be comprised under the designation of customers. The injunction also may operate most unequally. In a business of a special character it might practically prevent the defendant from carrying on business at all, whereas, in a business of a different character, it might have very little effect.

Further consideration, however, has satisfied me that the decision in *Labouchere* v. *Dawson* (2) (although it does not go so far as I think would be abstractedly just) is founded on a right principle, and the difficulty of doing complete justice should not prevent us from meting out such scanty measure of protection to the purchaser of a goodwill as the circumstances permit of; and, although the difficulties I have pointed out exist, they are not insuperable or (probably) formidable in practice. The question whether any person is a customer within the meaning of the injunction is one of fact, to be decided when it arises according to the circumstances of the case.

I have had the opportunity of reading the judgment which has been delivered by my noble and learned friend on the woolsack (Lord Herschell), and I desire to express my concurrence in the reasoning upon which it is founded. In particular, I think that the principle on which the injunction asked

(1) 27 Ch. D. 145. (2) L. R. 13 Eq. 322.

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for may be supported is that the defendant is availing himself of the knowledge of the connection formed by his old firm, which knowledge he acquired only as a member of that firm, to take away or depreciate the value of the goodwill or connection which he has contracted shall belong to the plaintiff.

I agree as to the form of the injunction, and also as to the costs.

LORD HERSCHELL. My Lords, my noble and learned friend the Lord Chancellor of Ireland (Lord Ashbourne), who is not able to be present to-day, has asked me to state that he concurs in the judgment.

Order of the Court of Appeal reversed, with a declaration that the appellants are entitled to an injunction restraining the respondent, his partners, servants, or agents, from applying privately, by letter, personally, or by a traveller, to any person who was, prior to the dissolution of the partnership, a customer of the firm of Tabor, Trego & Co., asking such customer to continue after the dissolution to deal with him, the respondent, or not to deal with the appellants; the respondent to repay to the appellants the costs in the Court of Appeal paid by them to him; Cause remitted to the Chancery Division.

Lords' Journals December 5, 1895.

Solicitors for appellants: *R. Miller, Wiggins & Naylor.*
Solicitor for respondent: *H. J. Mannings.*

[HOUSE OF LORDS.]

THE SAN PAULO (BRAZILIAN) RAILWAY COMPANY, LIMITED . . . . } APPELLANTS; H. L. (E.) 1895 Dec. 17.

AND

S. G. CARTER (SURVEYOR OF TAXES) . . RESPONDENT.

Revenue—Income Tax—Company resident in United Kingdom—Trade carried on partly in United Kingdom, partly Abroad—"Foreign Possessions"—5 & 6 Vict. c. 35 s. 100 Sched. D. First and Fifth Cases.

Where a trade is carried on either wholly in the United Kingdom or partly within and partly outside it, and profits accrue therefrom to a person or a corporation residing in the United Kingdom, the assessment for income tax falls under the First Case of Sched. D. of 5 & 6 Vict. c. 35 s. 100, and does not fall under the Fifth Case, and the duty is to be computed upon the full amount of the balance of the profits or gains of the trade, and not only upon the actual sums annually received in the United Kingdom.

A company registered under the Companies Acts, whose registered office was in England, were the proprietors of a railway in Brazil. The working of the railway was under the control and direction of, and the business of the company was managed by, the directors in England. The directors purchased in England and sent out to Brazil the materials and plant necessary for the purposes of the railway. The accounts were kept and the balance-sheet and reports were made out in London, where also the meetings were held, and all dividends were declared and paid. With the exception of certain small amounts for transfer fees and annual interest on money, the whole revenue of the company arose from moneys paid to them in Brazil for the carriage of passengers and goods on the railway and for other matters connected with the railway:—

Held, that it was not necessary to decide the question whether the business of the company was carried on wholly in the United Kingdom, since it was clearly carried on partly in England and not (as in *Colquhoun* v. *Brooks* (14 App. Cas. 493)) wholly outside the United Kingdom; and that the company were therefore assessable to income tax, under the First Case of Sched. D. of 5 & 6 Vict. c. 35 s. 100, upon the full amount of the balance of the profits or gains of their business, and not, under the Fifth Case, only upon the actual sums annually received in the United Kingdom.

The decision of the Court of Appeal ([1895] 1 Q. B. 580) affirmed.

APPEAL on a case stated by Commissioners for Income Tax.

The facts stated so far as material to this report were as follows:—

The San Paulo (Brazilian) Railway Company, Limited,

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appealed against an assessment for income tax under Sched. D of 16 & 17 Vict. c. 34.

The company was an English company, registered under the Joint Stock Companies Acts, with memorandum and articles of association, and having its registered office at No. 111, Gresham House, Old Broad Street, in the City of London. The articles of association provided (inter alia) as follows: The business of this company was declared to be the making, maintaining, managing and working of a railway in Brazil from Santos by San Paulo to Jundiahy. The general direction of the company was to be in London; but the company might have agencies in Rio de Janeiro and San Paulo, and any other places in Brazil. The business should be carried on by or under the management of the directors, but subject to the control of general meetings; and no person, except the directors and persons thereunto expressly authorized by the board, was to have any authority to enter into any contract so as to impose thereby any liability on the company. The registered office of the company was to be at such place in London or Middlesex as the board should from time to time appoint. The ordinary meetings were to be held half-yearly at such places in London or Middlesex as the directors from time to time should appoint. General meetings were to be held at such convenient places in London or Middlesex as the directors or the requisitionists calling the meeting should appoint. The board were to have full powers for the following purposes, and to exercise the same when necessary, namely, the entering into any contracts for the construction or service of the railway or the supply of the necessary funds; the making and carrying into effect any agreements, contracts or conventions for the purchase of lands and the supply of materials, labour, plant, rolling stock and other effects; the general conduct and management of the business of the company; the appointment and removal and the determination of the duties and salary of the secretary, superintendents, clerks, agents and servants of the company, and the securities to be taken from them respectively; the keeping of proper accounts of the receipts, credits, payments, liabilities, profits, losses, property, effects, claims and demands

of the company; the controlling, managing and regulating in all other respects, except as by the articles otherwise provided, of all other matters relating to the company and the affairs thereof. The secretary was to keep the records, books and papers (not being securities) of the company, allowing such inspection as required by the statute between the hours of eleven in the forenoon and three in the afternoon to every shareholder who signed his name in a book kept for the purpose. The board were to appoint a superintendent in Brazil, in order that he might there administer the company's affairs and represent the board, and communicate directly with the Government and the Provincial Government of San Paulo and other authorities, and were to determine his salary and the security to be taken for his duly accounting for all moneys of the company coming to his hands and for the faithful performance of the duties of his office. The superintendent might at any time be dismissed by the board, and must obey and execute the orders and instructions of the board, and was to make to the board, at such times as they might appoint, reports of the state of the works, and all occurrences which had taken place relating to the company, and to perform such other duties as the board might prescribe. All dividends on shares were to be declared by the ordinary meetings.

The commissioners found as a fact that, with an exception of transfer fees amounting on an average of three years to 128*l.* a year, and annual interest on money amounting on a like average to 1423*l.* 11*s.* 3*d.* per annum, the whole revenue of the company arises from moneys paid to them in Brazil for the carriage of passengers, goods, merchandise and cattle, on the San Paulo (Brazilian) Railway, and for other services and miscellaneous receipts connected with the railway.

The commissioners further found as facts, and it was admitted on behalf of the appellants, that the company is an English company resident in England, the control and direction being in London, and the business of the company is carried on under the direction of the directors here. The directors enter into contracts for and purchase in England, and send to Brazil the materials for additions, extensions and improvements, of

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their property, for repairs thereto, and for new plant, such as engines, wagons, &c. The accounts are kept in London, where the balance-sheets, reports, &c., are made out, all meetings are held, and dividends declared and paid. The directors have appointed a superintendent, who resides in Brazil, and he is a salaried servant of the directors, removable at their pleasure, and must obey and execute the orders sent out to him by the directors from London.

The company contended before the commissioners that they were chargeable, not under the First Case, Sched. D s. 100 of 5 & 6 Vict. c. 35, on the full amount of the balance of the profits and gains of the company, but under the Fifth Case, Sched. D, in the same section, only upon the full amount of the actual sums received in the United Kingdom, upon an average of three years. It was admitted that if the company were chargeable under the First Case, the assessment was correctly made on the sum of 370,122*l.*, and if under the Fifth Case, the assessment should be in the sum of 295,070*l.* The commissioners held that the company were chargeable under the First Case, and confirmed the assessment subject to the case.

The Queen's Bench Division (Vaughan Williams and Wright JJ.) held that the company was assessable to income tax, not under the First Case, but under the Fifth Case, and reduced the assessment to the lower sum accordingly. The Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.) held that the company was assessable under the First Case, and not under the Fifth Case, and confirmed the determination of the commissioners. (1)

The Income Tax Act 1853 (16 & 17 Vict. c. 34) s. 2 Sched. D imposes income tax "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively

(1) [1895] 1 Q. B. 580.

carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains."

Sect. 5 provides that the duties granted by the Act shall be assessed, raised, levied, and collected under the regulations and provisions of 5 & 6 Vict. c. 35 (Income Tax Act 1842).

The Income Tax Act 1842 (5 & 6 Vict. c. 35) s. 100 provides that "the duties hereby granted, contained in the schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment. . . .

"Sched. D . . . . Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.

"First Case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act. . . . Rules.—1st. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending,' &c. . . .

"Fifth Case.—The duty to be charged in respect of possessions . . . . in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain" (now the United Kingdom) "and foreign possessions. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain" (now the United Kingdom, see s. 5 of the Act of 1853) . . . . "computing the same on an average of the three preceding years, as directed in the First Case," &c.

Nov. 15, 18. *Sir E. Clarke Q.C.* and *Bigham Q.C.* (*A. M. Bremner* with them) for the appellants. The business of the appellants is wholly carried on in Brazil. The fact of the company being English and registered in England is not material; the test is where the profits are earned, and that is in Brazil. The carrying trade of the railway is exclusively in Brazil, no

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part of it is in England, and it is from the carrying trade that the profits are derived. The purchase of materials and plant here for export and use there, is not carrying on a trade here. They might have been, and perhaps will be in future, bought in Belgium or otherwise abroad, and it cannot be that a business is one year English and the next year foreign according to the place of purchase. The object of the purchase is to carry on the business in Brazil, not here. The business is therefore a "foreign possession" within the Fifth Case of Sched. D, and the company is assessable only upon the actual sums received in England. The decision of this House in *Colquhoun* v. *Brooks* (1) governs the present case. Lord Herschell there said (2), in reference to *Cesena Sulphur Co.* v. *Nicholson* (3), and other cases relied on by the Crown, that important considerations pressed in argument upon this House had not been present to the minds of the judges in those cases, and that they could not, therefore, be regarded as authorities determining the question. The mere fact that Brooks was an individual, whereas the present appellants are a company, makes no difference. Brooks had the right to exercise a like control over his business to that which is exercised by the directors in this case. *Sulley* v. *Attorney-General* (4), in the Exchequer Chamber, is in point. The defendant was a partner in a New York firm, for which he bought goods in this country for exportation, and was held not chargeable in respect of profit made by goods so exported. And Cockburn C.J. observed: "If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice." *Bartholomay Brewing Co.* v. *Wyatt* (5), and *Nobel Dynamite Trust Co.* v. *Wyatt* (5), were also cases of English companies trading abroad which were held not liable for income tax in respect of profits retained or distributed abroad. In *Colquhoun* v. *Brooks* (1) Lord Macnaghten protested against a narrowing of the meaning to be assigned to "foreign possession," and the test which he applied was "the source of income," which in this case is clearly abroad.

(1) 14 App. Cas. 493.
(2) 14 App. Cas. at p. 510.
(3) 1 Ex. D. 428.
(4) 5 H. & N. 711.
(5) Reported together, [1893] 2 Q. B. 499.

London Bank of Mexico and South America v. *Apthorpe* (1) is distinguishable. There it was held that the business was one business entirely carried on in England; here that is not the case.

Sir R. E. Webster A.-G. and *Sir R. T. Reid Q.C.* (*Danckwerts* with them) for the respondent. There are three classes of cases: (1.) where the business or source of income is here; (2.) where it is wholly abroad; (3.) where it is partly at home and partly abroad. In the second class alone it is a "foreign possession," as in the case of *Colquhoun* v. *Brooks*. (2) The present case if not within the first is, at all events, within the third category, for the business is certainly carried on partly in London, where it is managed and directed. The brain is here, though the limbs are abroad; the policy and control, the rates to be charged and contracts to be made, the appointment and dismissal of servants, are determined in London. The profits, therefore, are partly made in England. It is difficult, no doubt, to draw the dividing line; but the line laid down by Lord Herschell in *Colquhoun* v. *Brooks* (2) separates this case from that. There, there was no machinery for assessing the respondent; there was no one to make a proper return. But in this case the accounts are kept, and the officers are resident in London. The *Imperial Continental Gas Association* v. *Nicholson* (3) followed *Cesena Sulphur Company* v. *Nicholson* (4) and *Calcutta Jute Mills Co.* v. *Nicholson*. (5) These cases are not inconsistent with and are not overruled by *Colquhoun* v. *Brooks* (2); the reasoning of that decision determines the present question.

Sir E. Clarke, Q.C., in reply.

The House took time for consideration.

Dec. 17. LORD HALSBURY L.C. My Lords, I think one proposition has been conclusively established by the various cases that have come under your Lordships' consideration, and that is, that where the trade is wholly or partially carried on in

(1) [1891] 2 Q. B. 378.
(2) 14 App. Cas. 493.
(3) 37 L. T. (N.S.) 717; 1 Tax Cases, 138.
(4) 1 Ex. D. 428.
(5) 1 Ex. D. 437.

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this country the trader is liable to pay income tax on the profits of his trade.

Now, in this case the appellant company is an English company residing (so far as that abstraction a corporation can reside at all) in England. It has an office in London, and I am disposed to think (though it is unnecessary for the purposes of this case to say so) that its trade, if the word "trade" is strictly construed, is wholly carried on in England. It seems to me that, as was said by Cockburn C.J. in the case of *Sulley* v. *Attorney-General* (1), "it is probably a question of fact where the trade is carried on," and it is probably true to say that that phrase may be understood in two different senses. It may mean where the goods in respect of which trading is carried on are conveyed, made, bought, or sold; or, speaking of land, where it is cultivated or used for any other purpose of profit. That makes the locality of the goods or the land which are the subjects of the trade to be in a certain sense the place where the trade is carried on, because it is the place where the things corporeally exist, or are dealt with. But there is another sense, in which the conduct and management, the head and brain of the trading adventure, are situated in a place different from that in which the corporeal subjects of trading are to be found. It becomes, therefore, a question of fact, and according to the answer to be given to the question where is the trade in a strict sense carried on, will the assessment be.

My Lords, it is therefore necessary to determine upon these principles where this appellant company carries on its business. It deals, undoubtedly, with land in the Brazils. In Brazil the payments are received, and in Brazil the passengers and goods are carried; but the form of trading can make no difference. If it were a mine, as in the *Cesena Case* (2), or a jute mill, equally with a railway, the person who governs the whole commercial adventure, the person who decides what shall be done in respect of the adventure, what capital shall be invested in the adventure, on what terms the adventure shall be carried on, in short, the person who, in the strictest sense, makes the

(1) 5 H. & N. 711. (2) 1 Ex. D. 428.

profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading. That person appears to me, in this case, to be the appellant company. Every one of the tests I have applied are applicable to its proceedings. A shipowner, or indeed a shipbroker, may not have any one of the ships or the charterparties which he negotiates in England; but by correspondence or by agency he may have both charterparties and ships, not necessarily British ships, all over the globe. But if he lives in London, and by his direction governs the whole of this commercial adventure, could it be properly said that he is not carrying on his trade in London? So it appears to me that this appellant company is carrying on the trade in London, from which it issues its orders, and so governs and directs the whole commercial adventure that is under its superintendence.

I am, therefore, of opinion that the appeal must be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. My Lords, the decision of this appeal does not involve any new controversy upon the construction of the Income Tax Acts. It depends, in my opinion, upon the answer which ought to be given to a single issue of fact.

The law which must govern the present case appears to me to be settled by the judgment of this House in *Colquhoun* v. *Brooks*. (1) It was held in that case that the interest of a partner, resident in England, in the profits of a trade which was exclusively carried on in Australia by the other members of the firm, was chargeable with income tax, not under the First, but under the Fifth Case of Sched. D. The noble and learned Lords who took part in the decision were of opinion that the interest of the English partner was included in the sweeping language of the First Case; but they held that it also constituted, within the meaning of the Fifth Case, a possession in one of Her Majesty's dominions out of the United Kingdom. The ground upon which the interest was held to be taxable in terms of the Fifth Case was, that the Income Tax Acts contain no machinery for assessing, under the First Case, profits accruing from any

(1) 14 App. Cas. 493.

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trade which is not wholly or in part carried on within the United Kingdom, whereas they do provide machinery for assessing, under the Fifth Case, profits arising from trade exclusively carried on outside of the United Kingdom.

In my opinion, the decision in *Colquhoun* v. *Brooks* (1) directly affirms the rule that every interest in the profits of trade, belonging to a person who is, within the meaning of the Acts, resident in the United Kingdom, must be charged under the First Case of Sched. D. if the trade is carried on, either wholly or partly, within Great Britain or Ireland, and is chargeable under the Fifth Case, if the trade is exclusively carried on in any of Her Majesty's dominions out of the United Kingdom. The considerations which are applicable to trades wholly carried on in these dominions apply with equal force to trades exclusively carried on in foreign possessions which are not subject to the British Crown; and it appears to me to be a matter of necessary implication that the interest of a resident here in profits derived from a trade of the latter description must also be assessed for income tax under the Fifth Case of Sched. D.

When it has been ascertained that a person interested in the profits of a trade has his residence in the United Kingdom, in such sense as to bring him within the incidence of the Income Tax Acts, the only question remaining for consideration is, whether the measure of his liability is to be found in the First or in the Fifth Case of Sched. D; in the one case, he is liable to pay duty in respect of the net profits accruing to him from such trade; in the other, in respect only of such part of these profits as shall have been actually received by him in this country. But he cannot, according to the rule established in *Colquhoun* v. *Brooks* (1), escape from liability under the First Case, unless he is able to shew that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that the trade is exclusively carried on in a country or countries outside the United Kingdom, whether subject to Her Majesty or not. If he succeeds in proving that fact, his liability will be under the Fifth Case.

The appellant is an English company, incorporated with

(1) 14 App. Cas. 493.

limited liability under British statutes, and having its registered office in London. It is not disputed that the company has its domicil in England, and is liable to pay income tax in respect of any profits earned in the course of its trade. The only complaint made is, that the amount of such profits has been assessed for duty under the First Case, whereas the appellant maintains that it ought to have been assessed under the Fifth Case, because the trade of the company is wholly carried on beyond the limits of the United Kingdom. I have had no difficulty in rejecting that contention. It is not necessary to consider whether the whole trade of the company ought to be regarded as carried on in England. To my mind, it is perfectly clear that, in point of fact, part of its trade is carried on there, and that is sufficient to bring its profits within the First Case of Sched. D.

It is no doubt true that the undertaking, in order to carry on which the company was incorporated, consists, as its memorandum bears, in "the making, maintaining, managing, and working" of a railway in Brazil, and in "the making, maintaining, managing, and working" of branch lines, roads, canals, and other means of communication in connection with the main line. It is also true that the directors, as authorized by the articles of association, manage and work the railway and its connections through a superintendent in Brazil appointed by them, and a staff of servants in Brazil who are under his immediate supervision; and that the receipts of the company from which profits made by it are derived are earned and paid in Brazil. But the substantial fact remains, that the directors, subject to any resolutions which may be passed for their guidance by the members of the company, are vested with the sole right to manage and control every department of its affairs. Apart from the authority, express or implied, which they have from the directors, neither the superintendent nor any other servant of the company has any power to act in the carrying on of its trade. They are in no sense traders; they are merely servants, and in that capacity are remunerated for the services which they are employed to perform. The profits of the undertaking, although they are received by these servants, do not belong to them, and are not in their disposal, their only duty,

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unless otherwise directed by the company, being to transmit them to London; and the company here is the sole judge whether they ought or ought not to be distributed among its members. The only persons who can with propriety be described as carrying on the trade of the company, are its directors, who, for all purposes of administration and management, are the company itself. I do not think that, in such circumstances, the particular localities in which debts are incurred to the company, or are paid to its agents, are of any consequence in ascertaining by whom its trade is carried on.

I therefore concur in the judgment which has been moved.

LORD SHAND. My Lords, having had an opportunity of reading and considering the judgments which have now been delivered by the Lord Chancellor and by my noble and learned friend Lord Watson, I do not propose to add anything to what has been said. I concur in thinking that the unanimous judgment of the Court of Appeal should be affirmed for the reasons which have been now assigned.

LORD DAVEY. My Lords, I may content myself in this case with saying that the business of the appellant company is not, on the facts stated in the case, entirely or exclusively carried on abroad, and therefore that the case of *Colquhoun* v. *Brooks* (1), on which the appellants' counsel relied, is no sufficient authority for the proposition which they maintained. No doubt the profits of the company are derived from the profitable use of land in Brazil, and from the business of carriers carried on in that country, and in that sense it is a Brazilian business. But it is not sufficient to say that the company are carrying on a Brazilian business (as Wright J. thought), if the company is carrying on that business wholly or partially in this country. It is clear to my mind that the direction and supreme control of the appellant company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control or may control their duties, remuneration, and conduct,

(1) 14 App. Cas. 493.

and to whom any question of policy or any contract or other matter may, and if deemed of sufficient importance I suppose would, be referred for their decision. The business is therefore in very truth carried on, in, and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country. I do not attach any importance to the fact of the railway and business belonging to a corporation and not to an individual, except that in the case of an English joint stock company formed for the purpose of carrying on a particular business it is perhaps easier to say where is the seat of administration and direction.

In my opinion, therefore, the case is outside both the decision and the reasoning of the noble and learned Lords who gave judgment in the case of *Colquhoun* v. *Brooks* (1), because I find that every one of those noble and learned Lords confined his observations to a case in which the business was entirely carried on abroad. Whether it would be possible in any case for a sole owner of a foreign business having exclusive power of control over it, but resident in this country, successfully to maintain that he did not carry on a business here, it is unnecessary to say. That question, which is probably one of fact, will be dealt with when it arises according to the circumstances of the case.

I am, therefore, of opinion that the business of the San Paulo Company is not a "foreign possession" within the meaning of the Fifth Case of s. 100 Sched. D as interpreted in *Colquhoun* v. *Brooks* (1); and, that being so, the case undoubtedly falls within the language of the First Case, and it follows that the company has been rightly charged upon the whole of its profits or gains.

Judgment appealed from affirmed and appeal dismissed with costs.

Lords' Journals December 17, 1895.

Solicitors for appellants: *Clements, Williams & Chapple.*

Solicitor for respondent: *F. C. Gore.*

(1) 14 App. Cas. 493.

[HOUSE OF LORDS.]

H. L. (E.) 1895 Dec. 18.

GEORGE BRAY . . . . . APPELLANT;

AND

JOHN RAWLINSON FORD . . . . . RESPONDENT.

Libel, Action for—Misdirection—New Trial—"Substantial Wrong or Miscarriage"—Rules of the Supreme Court, Order XXXIX. r. 6.

In an action for libel the judge misdirected the jury in favour of the plaintiff upon a material part of the libel and the jury gave a verdict for large damages. The Court of Appeal thought that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction had been the other way, and refused the defendant's application for a new trial on the ground that in their opinion no "substantial wrong or miscarriage" had been occasioned by the misdirection, within the meaning of Order XXXIX. r. 6:—

Held, reversing the decision of the Court of Appeal, that since the assessment of damages is the peculiar province of the jury in an action for libel, and since the jury had not had the defendant's real case submitted to them and might, in assessing the damages, have been influenced by the misdirection, there had been a substantial wrong or miscarriage within Order XXXIX. r. 6 and that there must be a new trial.

THE appellant was a governor of the Yorkshire College, of which the respondent was vice-chairman. The respondent had also acted as solicitor to the college and had been paid his charges under the circumstances related in the judgment of Lord Herschell. The appellant wrote a letter to the respondent beginning thus: "Sir, during last summer, as you are aware, it came to my knowledge that whilst holding the fiduciary position of vice-chairman of the Yorkshire College you were illegally and improperly, as you know, making profit as its paid solicitor." The letter, which was long, contained comments upon the respondent's conduct, with imputations as to motives and allusions to swindlers, which might be construed as highly libellous. This letter the appellant circulated among the governors of the college and other persons. The respondent having brought an action for libel against the appellant, which was

tried before Cave J. and a special jury at Leeds, Cave J. directed the jury that under clause 4 of the memorandum of association of the college the respondent, although vice-chairman, was entitled to receive remuneration for his services as solicitor. (1) The jury returned a verdict for the plaintiff for 600*l*. The appellant having moved for a new trial on the grounds of misdirection, that the verdict was against the weight of evidence, and that the damages were excessive, the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.) held that Cave J. had misdirected the jury as to the effect of the clause, but being of opinion that no substantial wrong or miscarriage had been thereby occasioned in the trial within the meaning of Order XXXIX. r. 6, and that the verdict was right and the damages not excessive, dismissed the application with costs. Their Lordships appear to have considered that looking at the nature of the libel, even if the direction had been the other way the jury might properly, and would probably, have given the same verdict. Against this decision the defendant brought the present appeal.

Order XXXIX. r. 6 of the Rules of the Supreme Court provides that "a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, ... unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial. . . . ."

(1) Clause 4 was as follows: "The income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the association, as set forth in this memorandum, and no portion thereof shall be paid or transferred, either directly or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit to the persons who at any time are or have been members of the association, or to any of them, or to any person claiming through any of them, provided that nothing herein shall prevent the payment in good faith of remuneration to any officers or servants of the association, or to any members of the association, or other person, in return for any services actually rendered to the association, or by way of reimbursement of payments made, or costs, charges, or expenses incurred in or about the business of the association, or on behalf of the association, or the award or payment in good faith to any member of the association of any honorary distinction or emolument to which he would be entitled according to the rules and regulations of the association, independently of his being a member."

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1895. Dec. 2, 3. *Sir E. Clarke Q.C.* and *Bigham Q.C.* (*Atherley Jones* and *H. Greenwood* with them) for the appellant. The defendant was entitled to have his case put to the jury, but it was not put. An erroneous case instead of the real case was put. The jury were told in fact that it was a libel and they would be justified in giving their verdict upon that assumption. The fact that the Court may think that the result was right is not conclusive on the question of substantial wrong or miscarriage. So to hold would be to substitute the Court for the jury, whose peculiar province it is to assess the damages in an action of libel. No one can say for certain how far the jury may have been influenced by the misdirection which was upon a material point. The judge having withdrawn the principal part of the defendant's case from the jury, there was a substantial wrong to the defendant and a miscarriage of justice.

[They also referred to *Jenoure* v. *Delmege* (1); *Blair and Girling* v. *Cox*. (2)]

Sir F. Lockwood Q.C. and *Odgers Q.C.* (*Scott Fox* with them) for the respondent. The evidence shewed that the appellant had long had a grudge against the respondent, and the jury manifestly thought that he was actuated by malice, or they would not have given such damages. And the worst part of the libel was not the allegation as to the respondent making a profit as solicitor, but the comments and allusions to swindlers. There is no reason to suppose that even if the direction of Cave J. had been in favour of the appellant the jury would have given smaller damages for a libel so malicious and unfounded. The question whether there has been a substantial wrong or miscarriage is for the opinion of the Court and if the Court consider (as the Court of Appeal did) that the jury would have given, and would have been justified in giving the same verdict, if there had been no misdirection, there ought not to be a new trial. The clause in the memorandum was difficult of construction and the respondent might well construe it to mean that he was entitled to profit costs. There was not the slightest evidence in support of the appellant's reflections upon

(1) [1891] A. C. 73. (2) 37 Sol. J. 130.

the respondent's character: that was the main point, and the question under the clause was of minor importance.

[They also referred to *Watkin* v. *Hall.* (1)]

Bigham Q.C. in reply.

The House took time for consideration.

Dec. 18. LORD HALSBURY L.C. My Lords, in this case, an action for libel, the learned judge directed the jury that the plaintiff, who was a solicitor, was entitled to charge an institution, of which he was himself both occasionally the solicitor and also a governor—that is, a person entrusted with the government and management of the institution in question—the profit costs which he would have been entitled to charge if he had not filled that character. It is not necessary to consider whether the institution could have given such a consent as would have enabled him to have taken such profit, because I am of opinion that no such consent was, in fact, given; the matter relied upon is absolutely irrelevant to such a question.

It cannot now be denied that this was a misdirection. The only question, therefore, which we have to deal with is whether, in the language of the rule applicable to this matter, a substantial wrong or miscarriage has been thereby occasioned at the trial. My Lords, I think there has been a substantial wrong and a miscarriage. I think there has been a substantial wrong, since I think the defendant was not permitted to present his case to the jury with the argument that his original complaint was true. This seems to me a substantial wrong, and I am not prepared to say what a jury might think if they were told that the original complaint was itself unfounded, or if they were told that, though this original complaint was well founded, there was excess in the language by which that original complaint was made; but it appears to me that it was, in this case, withdrawing from the jury a question which the defendant had a right to have submitted—a right which was so relevant and important to the discussion that I must say I cannot regard it as

(1) L. R. 3 Q. B. 396.

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trivial or immaterial matter; and I think it was a miscarriage, as this view was not presented to the jury.

What influence such a wrong might have had upon the verdict or upon the amount of damages I am not disposed to consider. The case must be tried again, and I desire to say nothing which can in any way influence the arguments upon the trial which must take place. It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant. I do not think it desirable to say what would be my own construction of the rule in other cases not now before me.

I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed, and that a new trial should be ordered; and I move your Lordships accordingly.

LORD WATSON. My Lords, I shall endeavour, without recapitulating the facts of this case, to indicate the considerations which have led me to differ from the conclusion arrived at by the learned judges of the Appeal Court.

The error committed by the presiding judge consisted in his directing the jury that the respondent, as a governor of the Yorkshire College, was legally justified in charging and accepting payment of full professional remuneration in respect of services rendered by him to the college in his capacity of solicitor. Your Lordships can entertain no doubt that the respondent was neither entitled to charge profit costs in respect of these services, nor to retain them when received by him. Such a breach of the law may be attended with perfect good faith, and it is, in my opinion, insufficient to justify a charge of moral obliquity, unless it is shewn to have been committed knowingly or with an improper motive.

Order XXXIX. r. 6 of the Supreme Court Rules makes it imperative that a new trial shall not be granted on the ground of

misdirection, unless, in the opinion of the Court, "some substantial wrong or miscarriage has been thereby occasioned in the trial." I think it is clear that the misdirection given by Cave J. at the trial was such as to occasion a miscarriage in the sense in which that word was understood by the legal profession at the time when the Rules of 1883 were framed. The only question, therefore, which your Lordships have to consider is, whether the miscarriage has been substantial within the meaning of the order.

Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal. In the present instance the case made in evidence by the appellant was not submitted to the jury. The whole imputations in his letter of February 26, 1894, which are said to be libellous, arise out of and are strung upon the allegation that the respondent's acceptance and retention of full remuneration for the professional services rendered by him to the college were in violation of the law. The text or basis of these imputations was, in point of fact, true; but the case went to the jury on the footing that it was false. It is plain that the learned judge did not regard its falsity as an immaterial feature of the case which the jury had to consider. He told the jury: "In my judgment he" (i.e., the respondent) "was not making a profit illegally or improperly, and if it was not illegal or improper, of course Mr. Ford could not know that it was either; and that does impute to him conduct which, if it were true, would no doubt tend to lower him in public estimation, and properly so tend."

I have already indicated my opinion that the illegality of the respondent's conduct would not necessarily justify a charge of acting improperly if the impropriety imputed meant anything more than illegality; and I agree with the learned judges of the Appeal Court in thinking that, assuming illegality, there are other imputations in his letter which might sustain a verdict against the appellant. I do not profess to know all the considerations by which juries are influenced in arriving at their verdict; but it does appear to me that, in assessing damages, a

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jury might reasonably take into their consideration whether the charge upon which libellous imputations were made by way of comment was or was not in itself a libel. In the one aspect, the appellant's letter conveyed a wholly baseless and libellous charge; in the other, a well founded accusation, followed up by language which conveyed other and libellous imputations. I do not feel myself in a position to affirm that, in each of these cases, the same jury would have awarded the same sum of damages. I could not possibly arrive at that conclusion without first assessing the damages in each case for myself; and that is a duty which, in my opinion, I ought not to undertake in a case like the present. In such a case the assessment of damages does not depend upon any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined.

For these reasons I have come to the conclusion that there has been a substantial miscarriage within the meaning of Order XXXIX. r. 6, and that the case must be remitted for a new trial. I have purposely abstained from suggesting any general rule applicable to the construction of Order XXXIX. r. 6. I doubt the possibility of formulating any rule which would be useful, and I do not doubt the inexpediency of making the attempt. Each case must depend upon its own circumstances.

My noble and learned friend Lord Macnaghten, who is unable to be present, has requested me to state that he concurs in the views which I have expressed.

LORD HERSCHELL. My Lords, in this case the respondent obtained a verdict for 600*l.* in an action of libel tried before Cave J. and a special jury at Leeds. The respondent is a solicitor, and has been for some years vice-chairman of the council of the Yorkshire College. He has manifested his interest in the work of the college by large pecuniary contributions. Either alone or in conjunction with his partner he has acted as solicitor to the college since its incorporation nearly twenty years ago. Prior to 1878, in which year he entered into partnership with another solicitor, he made a present of

his time and labour to the college. After entering into partnership he considered that he was not at liberty to do so. He informed the college of this, and bills of costs were afterwards delivered to and charged against the college in the usual way. The total amount of the profit received by the respondent on these bills of costs, which covered the period from 1879 to 1893, was 103*l.* 10*s.* His annual subscriptions to the college during the same period considerably exceeded that amount.

The libel complained of was a copy of a letter addressed to the respondent, which was sent to more than 300 of the governors of the college and to some other persons. The letter commenced by stating that the respondent, whilst holding the fiduciary position of vice-chairman of the college, had been illegally and improperly, as he knew, making profit as its paid solicitor. On this were founded some comments which a jury would be, to say the least, justified in regarding as gravely libellous.

At the trial it was contended that the respondent was, by virtue of the fourth clause of the college's memorandum of association, entitled to receive remuneration for his services, notwithstanding the position he held as vice-chairman of the council. The learned judge adopted this view, and so directed the jury. The Court of Appeal have held that this was erroneous, and I agree with them. I do not think the words relied on have the effect contended for. It is not now in controversy that if this be so the respondent was not warranted in making a charge for his professional services. It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive

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rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services. It is clear, however, that the learned judge misdirected the jury, and that, as the misdirection cannot be said to have been on a point wholly immaterial, the appellant would have been entitled, prior to the Judicature Act, to a new trial as of right.

Order XXXIX. r. 6 provides that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned in the trial. The Court of Appeal came to the conclusion that there had been no such wrong or miscarriage in the present case. They thought, as I understand, that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the learned judge had been the other way. If I had thought that the enactment relied on sanctioned dealing with the case in this way, I am far from saying that I should have differed from the conclusion at which they arrived. But I have come, with some reluctance, I own, to the conclusion that it does not.

The provision is, in my opinion, a very beneficial one, and I should be sorry to say anything to narrow its scope further than the language employed seems to me to render necessary. In cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the Court think that the verdict of the jury is in accordance with the true view of the facts and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right to claim that the action should be tried by a jury. But in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal.

The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at 500*l.* or 1000*l.* Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial miscarriage within the meaning of the rule. The Court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded; but this is a mere matter of speculation: it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them.

I find it impossible to say that the case upon which the jury ought to have adjudicated ever was wholly before them, and that they were allowed to give to all the circumstances which might legitimately have influenced the verdict their due weight. This seems to me to establish that there has been a substantial miscarriage, and that the appellant is entitled to a new trial.

LORD SHAND. My Lords, I am of the same opinion, and, after the judgments already delivered, I shall endeavour to state shortly the reasons which have satisfied me that a substantial wrong or miscarriage was occasioned at the trial by the misdirection of the learned judge, and that in consequence the appellant is entitled to have the verdict set aside.

The plaintiff complained of the alleged libel, that it imputed to him that he had wilfully and knowingly acted illegally and improperly in claiming and receiving profits when acting as solicitor for the Yorkshire College while he held the fiduciary position of a member of the council and was vice-chairman of the college, and further that he acted from base, selfish and

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sordid motives, and was a man of the same character as the wire-pullers in the Liberator group of swindling companies, and that he had used religious, educational and philanthropic schemes as a hypocritical cover for the purpose of serving his own ends.

In the conduct of the case before the jury the plaintiff maintained what is very material to the present controversy, that the libel thus complained of was wholly unjustifiable, because there was no foundation for even the charge of his having claimed and received profits to which he was not legally and properly entitled, as by the memorandum of association of the college he was entitled to claim and receive the fees for business which had been paid to him.

The important bearing on the issue before the jury of the question whether the plaintiff was or was not entitled to charge and receive fees for professional business done for the college is apparent. If the plaintiff was entitled to these fees or profits then the libel was entirely unjustifiable, and the defendant was completely deprived of even the suggestion that to any extent he had acted in the public interest. If the plaintiff was not entitled to make the charges the defendant was in a position to plead that the plaintiff was so far in the wrong that to this extent the libel was justified, and that he had truly acted in the public interest—considerations which had a material bearing on the question of damages.

The plaintiff asked and obtained from the learned judge who presided at the trial a direction in law in his favour on the point of his legal right to make the charges; but it has been found, on a more careful consideration of the matter than could be given in the hurry of a trial, that this direction was erroneous. What was the effect of this, or what is it reasonable to infer was the effect? It appears from the charge of the learned judge that he treated the legal question as having an important bearing on the verdict. His Lordship said: "In my judgment he" (the plaintiff) "was not making a profit illegally or improperly, and if it was not illegal or improper, of course Mr. Ford could not know that it was either; and that" (meaning the alleged libel) "does impute to him conduct which, if it were

true, would no doubt tend to lower him in public estimation, and properly so tend." And in another passage he said: "It is for you to say whether it is true that the defendant was actuated by an honest desire to improve the public service, or whether under the guise of doing a public service he was seeking to gratify a feeling of spite and ill-will to the plaintiff." It is obvious that it was a very material consideration in the determination of this question whether the alleged libel was a gratuitous charge entirely without foundation, because the plaintiff was by law entitled to the profits he had made, or whether, on the contrary, the defendant was right in saying that the plaintiff was not entitled to these profits. The misdirection was therefore on a matter clearly material to the issue, which in reference to the point last noticed might possibly have even affected the question whether the plaintiff was entitled to a verdict, and which in any view might seriously affect the question of damages. There was therefore primâ facie a substantial wrong or miscarriage occasioned by the misdirection.

It has been argued, however, and the argument has found favour with the judges of the Court of Appeal, that if the case be looked further into it will be found that no such wrong or miscarriage was occasioned. It is said that in any view the libel contained unfounded charges of a most serious nature, imputing base motives to the plaintiff in his conduct and seriously affecting his moral character, and that the sum of damages found by the jury only does substantial justice in this view of the case. I agree with your Lordships in holding that this view cannot be sustained. It in effect asks that another and different case than that presented to the jury shall be tried, and tried, not by the proper tribunal of a jury, but by a Court of Appeal. The Court is asked to consider the libel and the evidence for the purpose of seeing whether liability exists on a view different from that formerly presented, and whether the damages given on the case formerly presented will not fit in suitably with this different case. I am clearly of opinion that, useful as the provision of rule 6 of Order XXXIX. may prove in other cases it ought not to be carried so far as the respondent's argument would carry it, and that the Court cannot be asked, in order to sustain

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a verdict which involves a substantial wrong to the defendant, not merely to assess damages, but to do so in trying a case materially different from that laid before the jury. The plaintiff may be fully warranted in believing that he will again obtain a verdict for an amount not less than the jury has awarded; but the defendant is entitled to have the real case submitted to the jury, and to have the amount of damages on that case assessed by them.

Judgment and order appealed from reversed: directed that a new trial be had, the costs of the proceedings in both Courts below to abide the event of the new trial: the respondent to repay to the appellant all damages and costs already paid to him, and to pay the appellant's costs in this House: cause remitted to the Queen's Bench Division.

Lords Journals December 18, 1895.

Solicitor for appellant: *C. Rawlings.*

Solicitor for respondent: *Richard Smith & Sons, for William Warren, Leeds.*

[HOUSE OF LORDS.]

ELIZABETH McCORD (PAUPER) . . . APPELLANT; H. L. (E.) 1895 Dec. 9.

AND

CHARLES CAMMELL AND COMPANY, LIMITED . . . . . RESPONDENTS.

Negligence—Master and Servant — Employer and Workman —"Person in Charge or Control of Locomotive Engine or Train upon a Railway"—Employers' Liability Act 1880 (43 & 44 *Vict. c.* 42) *s.* 1 *sub-s.* 5.

The Employers' Liability Act 1880 by s. 1 sub-s. 5 enacts that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer "who has the charge or control of any . . . locomotive engine or train upon a railway," there shall be the same right of compensation against the employer as if the workman had not been in his service.

A "person who has the charge or control of a train" does not necessarily cease to have charge of it, within the meaning of the Act, because some of the carriages are uncoupled from one another and from the engine in order that they may be separately dealt with. And those words do not necessarily point only to one person who is in charge of the whole train, but may include persons who have duties to perform in respect of parts of the train.

An engine-driver, employed with his fireman in the discharge of loaded wagons on a railway, took a locomotive engine and several wagons to a point on an incline, and there proceeded with the engine and one of the wagons to the place of discharge, intending to return for the other wagons in due course. The fireman uncoupled the remaining wagons and scotched them to prevent their running down the incline. One of the wagons broke away, ran down the incline, and killed a workman in the service of the same employers. There was evidence that the method of scotching adopted was unsafe and was known to and approved by the engine-driver. The representative of the deceased having brought an action for compensation against the employers:—

Held, reversing the decision of the Queen's Bench Division and the Court of Appeal, that there was evidence for the jury that the death was caused by reason of the negligence of a person who had the charge or control of a train within the meaning of the Act, since either the engine-driver had the charge or control, or the fireman had, and there was evidence of negligence in both.

THE appellant, the widow and legal personal representative of James McCord, brought an action against the respondents in the county court of Cumberland for negligence whereby the

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appellant's husband lost his life. The facts which appeared from the notes of the county court judge, who tried the case with a jury, were to the following effect: The deceased was employed on the iron and steel works of the respondents in Cumberland upon which are lines of rails belonging to them. On July 11, 1894, Fletcher, engine-driver, with Hopper, his fireman, was engaged in tipping slag, and in the course of this operation took a locomotive and several wagons loaded with slag along a siding of the railway to a position on an incline where the gradient was 1 in 66. Fletcher took the locomotive and one wagon to a place about twenty yards distant, called the Shear Legs, where the deceased was employed in uncoupling the wagons brought there preparatory to their being tipped. The remaining wagons were left on the incline and were there all uncoupled by Hopper and scotched by him in order to prevent them running down the incline. There they were to wait till the driver should return and take them one by one to the Shear Legs. While the deceased was uncoupling at the Shear Legs, having his back to the scotched wagons, one of them broke away, ran down the incline, and struck the deceased, causing injuries from which he died.

The respondents provided wooden sprags for the scotching, but Hopper scotched these wagons with slag, as usual. Fletcher and Hopper, who were called as witnesses for the plaintiff, testified that they preferred slag to wood for scotching as safer, and also as more convenient, since the wood was more difficult to free from the wheels. Another workman of the respondents named Jackson said he sometimes scotched the wagons, but it did not appear whether when he did so he acted as fireman or not. Evidence was given for the plaintiff by other witnesses that wood was safer for scotching than slag, which was apt to break and slip. It also appeared from Fletcher's and Hopper's evidence that wagons scotched as these were had broken away before. At the close of the plaintiff's case the judge ruled that there was no evidence of negligence under the Employers' Liability Act, and no case for the jury, and gave judgment for the defendants.

On appeal to the Queen's Bench Division, Wills and Wright JJ.

dismissed the appeal on the ground that Hopper could not be said to be a person having control of a train, and that even if he had, the default was in the management, not of the train, but of a single wagon, which could not be treated as a train. This decision was affirmed by the Court of Appeal (Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting), on the ground that the evidence did not shew that either Fletcher or Hopper had charge or control of the train. Rigby L.J. held that Fletcher could not get rid of the charge he had of the train by uncoupling his engine and leaving the train, and that since he knew of and permitted the use of slag, there was evidence for the jury of negligence in the person having the charge or control of the train.

By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, "Where after the commencement of this Act personal injury is caused to a workman . . . .

"(5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

T. S. Little (*Lumb* with him) for the appellant. It is not disputed that there was evidence for the jury of negligence in the manner in which the wagons were scotched. And negligence in this respect can be properly attributed to both the engine-driver and the fireman. To the fireman because he scotched the wagons, and to the engine-driver because he knew and approved of the material and method employed. The only point of contention, therefore, is whether either the driver or the fireman was a person who had the charge or control of the train within the meaning of the Act. It is enough for the appellant to shew that either the driver or the fireman was in charge of the train, or that both were. The driver was certainly

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in the beginning in charge of the train, and he did not cease to be so merely because he took the engine and one wagon away for the purpose of unloading. He was still in charge of the whole train, having the duty of direction and superintendence with respect to the wagons on the incline. But if not, then the fireman was in charge of those wagons. Or it may be that both men were in charge. It cannot be that no one was in charge. But if so, then independently of the Act the defendants are liable for a defective system: see *Sword* v. *Cameron* (1), approved in *Smith* v. *Baker*. (2)

Bigham Q.C. and *Mattinson*, for the respondents. There was no doubt evidence for the jury of negligence in the mode of scotching the wagons. But there was no evidence of negligence in any person who had the charge or control of the train within the meaning of the Act. If any one was in charge of the train, it must be the engine-driver, but there was no negligence in him; it was his duty to attend to his engine, not to get off and watch the scotching, which was left to the fireman. Moreover, the train was broken up, and ceased to be a train when it was uncoupled, and the engine-driver was no longer in charge of anything but the locomotive and one wagon; there was no "train" within the meaning of the Act. Then as to the fireman, he had no charge or control of the engine, and it cannot be inferred from a man's having one particular act to do in connection with some of the carriages that he was in charge of a train. It would be straining the words of the Act. The result is that there was no negligence while the train was a train, and after the uncoupling no one was in charge within the meaning of the Act.

LORD HALSBURY L.C. My Lords, I propose in the first instance to say what I infer from the evidence given in this case to be the state of the facts. If I understand the facts correctly, they amount to this: that the engine-driver and his fireman were bringing up to a particular point on these works a number of trucks loaded with slag; that the place at which the whole body of these trucks were stayed was a place on an

(1) 1 Court Sess. Cas. 2nd Series, 493. (2) [1891] A. C. 325.

incline of 1 in 66—a sufficient incline obviously from what afterwards took place to cause the trucks by the force of gravitation to run down unless they were properly arrested; that the duty of Fletcher and his fireman was to bring the trucks, one by one, to the particular place where the deceased man was employed, whose duty was in his turn to uncouple the truck which was brought down alone from the engine, in order that it should then be sent on its journey in some way that has not been explained, and perhaps is not material; and that the operation should be repeated from time to time until the whole of the loaded trucks were disposed of, and the materials in those trucks tipped over into some place for the purpose of the works.

I think a confusion has arisen partly from the fact that the learned counsel for the plaintiff had to call witnesses from the hostile camp, and to get from them as well as he could what was the course of business, and partly from the compendious character of the notes taken by the learned judge—a confusion between what I would call the ordinary and regular course of business, and the facts which were put in proof on this particular occasion. I infer from the evidence that what I have described was the course of business which all the parties to the transaction were familiar with, and were in course of performing on the occasion in question. I infer, then, that the engine-driver was the person who—I will not use the phrase, was in charge of the train, because I should seem to be following the language of the Act of Parliament, and to be assuming the proposition I am endeavouring to establish—but the engine-driver was the person who must necessarily, from his position, give the momentum to the particular truck he is taking down, and who by his removal of the particular truck which he is taking down, and leaving the other trucks upon the incline, would necessarily allow the other trucks to follow. It appears to me, therefore, that a necessary part of the operation with which the engine-driver was dealing was to take care that, when he was taking down the trucks one by one, the other trucks should not follow. Both the men who were called stated that such a thing had occurred within their knowledge: therefore everybody was alive

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to the fact that there must be some precautions taken against the recurrence of that accident. The engine-driver, as I say, giving the momentum to his train by turning the proper machinery which puts the steam on and causes the driving-wheel to operate, knows that he is doing that which will, unless the trucks he leaves behind are properly arrested, bring down the other trucks.

The inference I draw from these facts is that it was a common employment between the engine-driver and the fireman; that it is fallacious to take each part of the transaction by itself as if it was the only thing to be done; and that the engine-driver and the fireman were both in charge of the engine and of the trucks. What follows is this, that it is part of the duty of those who are conducting that operation to prevent the following of the trucks which are intended to be left behind. It appears to me, therefore, that it was a joint control of both the engine-driver and the fireman which is pointed to by this evidence. I do not profess to give any opinion upon the subject whether what was done was rightly or wrongly done, but it is clear that there was evidence for the jury that what was done was negligently done, for this reason. There appear to be sprags of wood which are provided by the company for the purpose of this very thing. The men—probably because it gives them more trouble to disentangle the wood afterwards from the wheel—prefer using slag which is there ready to their hands. I do not say how a jury ought to find upon that question—it seems to me to be enough to say this, that if slag is used it ought to be used in such a way as to prevent that happening which happened here. If it was a crumbling material, such as would not prevent that, the use of it in itself was negligence; or if it was used in such a way as would not prevent the truck going down, that is evidence that it was insufficiently done with that crumbling material. All that was for the jury; but a thing which it is certainly within the resources of science to prevent, namely, the coming down of this truck, was, by the act, or the omission to act, of the fireman, allowed to occur.

My Lords, the point which appears to have been relied on

in the argument of Mr. Bigham is this, that no one could say that the engine which drew the train was in the charge of the man who did the act from which the injury followed. I think there are two answers to that. The one which is most satisfactory to my mind is that the act done is not one thing, but two things, the disengaging the engine from the train by taking off the couplings, and, combined with that, the omission properly to secure the remaining part of the train. That seems to me to be a sufficient answer to the contention that the engine-driver and the fireman were not in charge of it; but I should not hesitate to say that each of them in turn was in charge of the operation which involved the use of the locomotive engine.

The Legislature, for very obvious reasons, I suppose among others the extremely dangerous nature of the employment which involves the use of locomotive engines and trains, has provided in this 5th sub-section that if "personal injury is caused to a workman" by "the negligence of any person in the service of the employer, who has the charge" of either a "locomotive" or a "train"—the words are in the disjunctive—the employer may be made liable. That which happened in this case I think may illustrate what the intention of the Legislature was. Here is a man engaged about twenty yards off who, by no possibility, can protect himself—he is obliged to deal with these dangerous implements, locomotives, and he is absolutely dependent upon the carefulness of his fellow servants in the use of these dangerous implements on behalf of his employer. I cannot help thinking that the Legislature meant in a very wide way to protect workmen who are engaged in such dangerous employments, and they said, as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence then, quite apart from any question of superiority of employment, and quite apart from the necessity of superintendence, the employer may be liable.

Now, my Lords, one word upon what construction your Lordships ought to place upon the words "a train." I doubt very much whether the Legislature intended these words to be

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narrowed in the way which Mr. Bigham has contended for. I should think, speaking in a general way, that the Legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine, should be included in "a train." I doubt very much whether it would depend upon the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway. I should think the Legislature intended a very wide scope to be given to the use of these words.

My Lords, under these circumstances I cannot help thinking that the Court of Appeal have entirely misunderstood the facts as they were presented. I do not believe there was the least ground for supposing that these operations were left open and unconnected with the employment of any particular person at the works. I have no doubt myself that in turn each of these persons did, and had charge of, the particular acts which are in proof here. Jackson did it one day, Hopper did it another day, and another engine-man, I dare say, did it another day; but as regards the particular transaction on the particular day, it appears to me that the engine-man and Hopper were the only two persons who had the charge of the operation, and who in the course of the operation had charge of the locomotive and of the train which did the mischief.

My Lords, under these circumstances I do not wish to go further into the evidence, because if this case is to be tried anew, I do not wish to express any opinion as to what the true result of the evidence may be; but I cannot entertain any doubt that upon these two questions, both of negligence and of the persons being in charge of the train, there was ample evidence for the jury to justify this being left to the jury; but inasmuch as the learned judge decided that there was no evidence of negligence and no case for the jury—by which I suppose he meant that there was no evidence of that particular responsibility which the Legislature contemplated in the 5th sub-section—he non-suited the plaintiff. It appears to me that cannot be right, and I move your Lordships that the judgment of the Court below be reversed.

Lord Watson. My Lords, I am of the same opinion. It appears to me that the disengaging of the tail wagons from the engine and securing them in order that they might remain stationary until the engine returned to take them up, was an act done in the conduct of the train with which that engine started. If that act was negligently done (which is a matter for the jury to determine) then, under the statute of 1880, the appellant is entitled to recover if the person guilty of negligence had at the time "charge or control of the train." The words, "any person having charge or control of the train," do not, in my opinion, necessarily point to *one* person who is in charge of the whole train. Different duties in connection with different parts of the train may be assigned to different persons, and, in that case, each and all of those persons are charged with the conduct of the train; and, if any one of them be negligent in his own department, that will constitute "negligence," bringing the case within the terms of s. 1, sub-s. 5.

My Lords, I shall only say further that, according to the view I take of the evidence, the appellant is entitled to go to a jury upon two alternatives, namely, either that Fletcher, the engine-driver, or that Hopper, his fireman, was guilty of a negligent act. It is plain that Hopper was the person who insufficiently scotched the wagon which ran down the incline and killed the deceased; but it may be that, although he was the direct cause of the accident, the engine-driver was also negligent in his duty, if he was charged with that duty. And I think, if that view were taken, he knew quite well the kind of sprag that was being used, and had reason to know that, although for some purposes sufficient, the use of it was attended with danger. On the other hand, if the duty of spragging was properly delegated to Hopper, he was, to that extent, in charge of the train, and was negligent. But on whichever of these alternatives negligence be found, whether it be fixed on the engine-driver or upon the fireman, I think it follows that such person is also fixed in the position of the "person having control of the train." It has been suggested by one of the learned judges in the Court of Appeal that the duty having been

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committed to a great many persons, any one of whom might have performed it, therefore the person actually performing it was not "in charge." To my mind, these considerations are very immaterial. I think the statute points directly to the person having "the charge or control of the train" as being that person who, at the time when the negligent act is committed, has the duty laid upon him of performing that act with reasonable care.

Upon these grounds, I think that this case must go down for a new trial.

LORD HERSCHELL. My Lords, I am of the same opinion. I see no reason to differ from, but very strong reasons for agreeing with, the view taken by Rigby L.J. in the Court below. It appears to me that there was in this case evidence of negligence on the part of the driver of this train. He undoubtedly was in charge of the train at the outset—he was in charge of it when it stopped at the point where it did stop. I do not think he ceased to be in charge of it because some of the carriages were uncoupled from one another and from the engine, with a view to their being dealt with separately in operations all directed to one end, namely, the discharging of the train of the contents with which he brought it filled. When he removed, or before he removed, the engine from the train, unless he wanted the rest of the train to follow, or was content that it should follow, it was absolutely essential that something should be done to detach that part of the train, and to make it stationary, while the rest of the train went on. That was a dealing with the train under his charge; and it seems to me that it was his duty to take care that all that was necessary for the operation with which he was concerned, namely, conveying these carriages severally and successively to the place where their contents were to be discharged, was done. It was not necessarily his duty to do it himself. If that duty had been left to some other servant of the company, and if he had every reason to believe that the duty was being properly performed, then it might well be that there could not be said to be negligence on his part—he would have discharged the obligation resting upon him by seeing

that the work was being done by the person whose duty it was in that sense to do it. But in the present case there is evidence that he knew the method which was being employed to sprag the wheels; there is evidence that he knew that it was a method which on previous occasions had proved ineffectual; there was the evidence of witnesses who were called before the jury that the use of this slag at all was an improper method—that the proper method was to use wood. Under these circumstances it seems to me impossible, when once the conclusion is arrived at that he was in charge of the train, to say there was no evidence of negligence upon his part.

But I desire to add that if it could be established that, as soon as he had detached his engine and carriage and left it to Hopper, or whoever it might be, to scotch the carriages, his duty was at an end, so that the scotching was left entirely to them, and that he was justified in saying, "I have left it with the proper person to scotch, and now I start with my engine and carriage," I should still think there was evidence of negligence. I am by no means prepared to accede to the proposition that the person so left is not in charge or control of the train. What is the section meant to guard against? The danger to employees of a company from the moving of a train from place to place along the line. That is the source of danger—the only way in which an accident can happen. Now, why has not the person upon whose act it depends whether a train moves or does not move "control of the train"? It is the only sense in which any one has "control" of a train, as it seems to me, within the meaning of the section, namely, that he can make it move or not move as he pleases. If, therefore, you can detach that operation so as to free the engine-driver from all liability as soon as he has left the proper person to scotch, and let him go on, it seems to me, I confess, to follow that then the person so left to prevent that train from moving beyond the point at which it was intended to remain cannot be said to be otherwise than "in charge or control" of the train. It seems to me that the word "control" is perfectly appropriate to what he has to do in relation to it, namely, control its

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motion or prevent its moving. My Lords, for these reasons I think the judgment must be reversed, and that there must be a new trial.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I am of opinion that Hopper cannot in any sense be held, in the operation in which he was engaged, and in which for argument's sake I assume he acted negligently, to have been either by himself or in conjunction with Fletcher "in charge or control of the train." I think that the case would be quite the same if it was Jackson who had scotched the wagons, and who for argument's sake I will assume had done it negligently. Who was in charge of the train, a portion of which had preceded to be tilted and a portion of which was left behind temporarily, to be returned for, as each of the wagons which had gone on its journey was discharged? I come to the conclusion that, within the meaning of sub-s. 5, Fletcher was, and that he remained in charge of the entire train, split up as it was, until he had finally brought each wagon to its final destination.

In this view there still remains the further question, Was Fletcher, who I have come to the conclusion was in charge or control of the train, guilty of negligence, or rather, was there evidence to go to a jury upon that question? I think it was not a case which should have been withdrawn from the jury who were entitled, under the entire circumstances which have been already referred to, to consider whether he was reasonably justified in thinking that the part of the train he had left behind was safely secured. I therefore concur in the judgment which has been arrived at by your Lordships.

LORD SHAND. My Lords, I am clearly of opinion, with your Lordships, that the wagons in question, standing on the top of the incline, formed part of the train. They were undoubtedly part of a train which had been brought by the engine-driver and the fireman to the spot at which one of the

carriages was uncoupled, and I cannot think that in any sense they ceased to form part of the train because there was a temporary movement of one carriage to one part, with the prospect of the engine returning to take up one carriage after another.

I am further of opinion, with your Lordships, that there was evidence of negligence to go to the jury. I concur in the view which has been expressed by some of my noble and learned friends, and which was taken by Rigby L.J. in the Court of Appeal, that there was certainly evidence to go to the jury of negligence on the part of the engine-driver. He had the control of the train from the first. It humbly appears to me that he did not cease to have the control of that train as it went on, and as it was being disintegrated by carriage after carriage being taken from it. But I concur further with those of your Lordships who think that if there was not charge or control of the train on the part of the engine-driver, there certainly would be on the part of Hopper, who was left with this carriage, with the duty which, if it was not the engine-driver's duty, was his duty. I therefore concur in thinking that the case must go down for trial.

LORD DAVEY. My Lords, I also agree in thinking that the engine-driver, Fletcher, was "in charge of the train," and remained "in charge of the train" till the duties with which he was entrusted were fully completed; and it seems strange to me to say, when we find that the engine-driver who is in charge of the train leaves three-fourths of the train in an exposed and dangerous position, and it turns out that insufficient precautions have been taken to secure the safety of that portion which was so left behind, that there is no evidence to go to the jury of negligence on the part of the "person in charge of the train."

My Lords, I also concur with those of your Lordships who think that, independently of the case with regard to Fletcher, there was sufficient evidence before the learned judge and jury to warrant the learned judge in holding that Hopper was in charge of that portion of the train which was on the incline,

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and that he performed the duty which was entrusted to him, and which he undertook, in a negligent manner.

Orders appealed from reversed, and a new trial directed, with costs here and below, the costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis: cause remitted to the Queen's Bench Division.

Lords' Journals December 9, 1895.

Solicitors for appellant: *Helder, Roberts, Son & Walton for E. Atter, Whitehaven.*

Solicitor for respondents: *H. N. Paisley for Paisley & Falcon, Workington.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1895 *Nov.* 26.

HENRY SMITH & CO. . . . . APPELLANTS;

AND

THE BEDOUIN STEAM NAVIGATION COMPANY, LIMITED . . . . . } RESPONDENTS.

Ship—Carriage of Goods—Bill of Lading—Short Delivery—Burden of Proof.

A shipowner is bound to deliver the full amount of goods signed for by the master in a bill of lading, unless he can prove that the whole or some part of it was in fact not shipped.

In an action for freight for the conveyance of 1000 bales of jute against the appellants, onerous indorsees of the bills of lading, the appellants claimed to retain the value of twelve bales short delivered of the 1000 shewn by the bills of lading signed by the master to have been shipped at the port of loading. There was no clear evidence as to how or where the missing bales had disappeared:—

Held (reversing the Court of Session), that there was nothing to displace the evidence supplied by the bills of lading that the missing bales had been received on board the vessel, and that the appellants were entitled to the deduction claimed by them.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland (1), dated February 1, 1895, which

(1) 22 Court Sess. Cas. 4th Series (Rettie), 350.

found the appellants, Henry Smith & Co., liable to pay the respondents, the Bedouin Steam Navigation Company, the sum of 35*l.* 7*s.* 2*d.*, the value of twelve bales of jute, less the sum of 3*l.* 3*s.*, being freight of the same. Lord Watson stated the facts, which were not in controversy, as follows: The master of the steamship *Emir*, owned by the respondents, received in the River Hooghly, for conveyance to the port of Dundee, two parcels of jute, and signed two bills of lading, each for 500 bales, which were purchased by the appellants. The bales in each parcel were marked in the same way. The respondents have made delivery of 988 bales, and they alleged and led evidence with the view of proving that the remaining twelve bales were not shipped. The Lord Ordinary (Lord Kyllachy), on December 15, 1894, found that they had failed to substantiate their allegations; but that decision was reversed by the learned judges of the Second Division, who held it to be established that the twelve bales in question had not been put on board the *Emir*.

The action was brought by the respondents against the appellants for the 35*l.* 7*s.* 2*d.*, the balance due for freight. The appellants claimed to be entitled to retain this sum out of the freight due to the respondents as the value of the twelve bales delivered short of the 1000 bales signed for in the bills of lading.

It appeared from the evidence that the mode of loading the ship at Calcutta and giving receipts was as follows: The bales were brought alongside in boats from the mills in Calcutta; the shippers made out documents called boat-notes, specifying the number of bales in each boat; on arrival of the boat at the ship the bales were by steam power hoisted on board in slings, four bales at a time; as the bales were slung up on board they were tallied by tallymen engaged by the shipowners, there being four tallymen, one stationed at each hatch; and, after a boat-load had been discharged, the tallies were compared with the boat-notes by the first officer, who then signed mate's receipts for the quantities, and it was from these mate's receipts that the bills of lading were made out. The first officer in his evidence said that, apart from the comparison of the boat-notes and the tallies, he

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had no means of checking the number of bales received on board; that reliance was placed upon the honesty of the tallymen, and if they made a mistake, whether wilfully or otherwise, there was no means of finding it out; that he or one of the other officers always looked into the boats to see that all the bales had been discharged before he or they gave a receipt; that sometimes there were bales in a bad condition—these only were left in the boat to be returned, they not being allowed for in the tally; that if a boat had a boat-note for 200, and only brought out to the ship 190 bales, and the tallymen in the ship, with arrangement with the boatmen, sign for 200, he had no way of detecting the fraud; that occasionally there would be thirty boats alongside at one time, and that sometimes a boat would lie with a full cargo on board for one or more nights, a full cargo being from 100 to 500 bales; that the bales were large objects, each weighing 400 lbs.; that once a bale was on board the ship it was stowed away in the hold at once or before night, unless damaged coming on board, when it was returned, and therefore after a bale was hoisted on board it was not possible for it to be abstracted; that during the day he and the other officers were about the deck, and at night the hatches were put on, and there was a watchman; that when this cargo of jute was coming on board the weather was very hot and the crew slept on deck, and if an attempt had been made to remove a bale the crew would have been disturbed; that all the tallymen were natives, as were also the stowers of the cargo. It also appeared that the loading occupied about twelve days, and that when the ship's cargo of over 2500 bales was on board the hatches were put on, and no portion of the jute cargo was touched or removed until the ship reached Dundee. But there was some evidence that every available space was filled with cargo, and that one bale was found lying loose under the forecastle.

The respondents' contention in the Court of Session was that the missing bales had been landed at Dundee, or in the alternative that they had never been placed on board. All the judges in Scotland were against them on the first point; but, as stated above, the Second Division (Lord Trayner delivering the judg-

ment of the Court) were for the respondents on the second point.

1895. Nov. 21, 22. *Cohen, Q.C.*, and *Aitken* (of the Scottish Bar), for the appellants. This appeal is brought for the purpose of obtaining from this House a general rule as to the liability of shipowners in similar cases. The only question now is, Were the missing bales ever put on board, or were they lost on the voyage? If they were lost, the shipowners are liable. The shipowners contend that these bales were never put on board, and that they themselves, not having made representations to that effect, are not bound by the evident mistake of their master. But their servant, the master, has signed bills of lading, negotiable instruments, shewing that these bales were received, and the shipowners cannot be heard to contradict those bills of lading unless they can prove absolutely actual short shipment. There is a possible way of accounting for these missing bales—namely, that they were put on board and a receipt was given, and that afterwards they were removed off the ship; but it is not for the appellants to account for where the missing bales went. In the next appeal in the list—*Harrowing* v. *H. Katz & Co.* (1)—the Master of the Rolls said the onus of displacing the receipt contained in the bill of lading was on the shipowners.

[LORD WATSON cited Lord Chelmsford in *McLean & Hope* v. *Fleming* (2): "The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship. And though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent."]

Bigham, Q.C., and *Boyd* (with them *Alexander Robertson*).

(1) 10 Times L. R. 115, at p. 401; affirmed by H. L., Nov. 26, 1895.

(2) April 3, 1871. L. R. 2 H. L., Sc. at p. 130.

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The Legislature, by the Bills of Lading Act (1), has considered that bills of lading should not be conclusive. Admitting that they are primâ facie evidence, it cannot be said they are strong presumptive evidence. The master has authority to sign the bills of lading; but that authority extends no further than his signing for what he has received. The respondents maintain that the evidence shews that these goods were never put on board or into their possession. The bills of lading are a mere reflex of the tallies; and the bills of lading do not carry the proof any further if there is an error in the tallies. The tallymen were all natives, and presumably not so careful as tallymen employed in this country. The evidence is that whatever was put on board was put under hatches, and it is not disputed that the ship was filled to its utmost capacity, and fastened down before sailing, and the cargo not disturbed until the ship arrived at Dundee. There was no reasonable possibility of the bales being abstracted from the ship, and the only rational conclusion to be drawn from the whole evidence is that the missing bales were never put on board, and that Lord Trayner was right in holding that the tallies were wrong.

1895. Nov. 26. LORD HALSBURY L.C. In this case it appears to me that the question which your Lordships are called upon to determine is a pure question of fact. I think there are no circumstances in this case which would justify one in laying down any general proposition from which the conclusion can be deduced. The conclusion which we ought to arrive at is one that arises from the facts in proof in this case; and I myself rather protest, when one is dealing with questions of fact, against laying down any rules that are not applicable to the particular case as it comes before us. Each case in turn differs in its circumstances, and there is no doubt that from time to time in the course of a cause the burthen of proof may shift from one side to the other many times.

In this case, undoubtedly, there was evidence that these goods which are now in dispute had been shipped on board this vessel. When I say there was evidence, I am not certain that

(1) 18 & 19 Vict. c. 111.

one gets to any more definite idea of what the proposition is by calling it primâ facie evidence, or by calling it by any other name which appears to diminish the value and the cogency of the evidence itself. Primâ facie evidence may be very weak, or primâ facie evidence in the ordinary sense of the words may be very strong. I think it is a proposition which is attributed to Lord Wensleydale, although I have not been able to verify it, that a man cutting a tree in a field was primâ facie evidence that he was seised in fee simple of the land. That puts, I suppose, in the strongest point of view, what may be said to be the logical conclusion from the circumstances which are presented in evidence; and in the extreme case that Lord Wensleydale gave I suppose it would be very easy to displace that primâ facie evidence, if it is primâ facie evidence, by other circumstances shewing that it was not in the exercise of his own right that he was cutting down the tree, but in the exercise of somebody else's right. In the particular case with which your Lordships have to deal there is a receipt—I am using now popular words, because I do not think the particular form in which this question arises ought to weigh much upon one's attention; it is a receipt for goods—that is what it amounts to —given by the person who was authorized to give the receipt for the goods for the express purpose of making evidence against the person who received them. Whether it is a receipt for goods, or whether it is a receipt for money, or whether it is a receipt for anything else, I suppose no one can doubt that, without explanation and without shewing that there was some mistake made in the receipt, or that the receipt was given under a mistake, or that it was induced by fraud, the conclusion to which any tribunal having that question before it must necessarily come is that unless displaced by evidence, unless some such topic as that is suggested, the ordinary result follows that the thing which was done as an acknowledgment of the receipt must have its due effect given to it. In truth, if that were not so, it would be impossible to conduct business at all. It is true that in the case of this class of mercantile documents, which has a force and effect of its own and involves the rights of other people, it is more important to assert what I have been

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suggesting than in the case of other documents; but, in truth, it is when you come back to it a mere question of fact: Were those goods received on board or not? To my mind, no evidence has been given by the other side—no evidence at all—leading to any such conclusion as should upset the value, or the force, or the effect of the document so given. In saying that, I do not deny that everybody on board—I am overstating the case on that side, because some of them were not called—may have given evidence perfectly bonâ fide in the belief that their vigilance was not eluded. But what then? It is not the first time in my experience that I have heard a whole body of evidence given from which, if you believed it, the logical conclusion would be that the goods were not lost at all, and yet they were lost, and this fact must be accounted for.

Now, my Lords, it appears to me that this being the merest question of fact, there is no evidence to displace the evidence of the document to which I have referred—the bill of lading. In speaking of the document I have used, as I said, popular terms, because I quite agree that one must trace up the bill of lading to its source—the mate's receipt and the tallymen's books; but all these things ultimately concur in producing the document which is the subject-matter of the controversy. It appears to me beyond all reasonable doubt that there is evidence of a cogent character, not displaced by any other evidence, not shaken in its effect or value by what has taken place before the Courts below. Under these circumstances, it seems to me that the only logical course which your Lordships can pursue is to give effect to the evidence that has been given, and refuse to act on mere conjecture or guesswork as to how these goods may have been lost if in truth they got on board. To my mind, the cardinal fact is that the person properly appointed for the purpose of checking the receipt of the goods has given a receipt in which he has acknowledged, on behalf of the person by whom he was employed, that those goods were received. If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the goods never were on board at all. Under those circumstances, no

such evidence having been given, I move your Lordships that this judgment be reversed, and the judgment of the Lord Ordinary be restored.

LORD WATSON. The rule of law applicable to this case appears to me to be settled beyond dispute. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel; but, when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can shew that the whole or some part of it was in fact not shipped. If the owner is able to satisfy that onus, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder.

[His Lordship then stated the facts not in controversy as given in the paragraph above, and continued:—]

When evidence has been adduced for the purpose of instructing short shipment, I do not think it is of any advantage to examine critically the principle upon which his master's acknowledgment is held to bind the shipmaster when it is not contradicted by proof. Whether, when it is uncontradicted, the acknowledgment ought to be regarded as affording primâ facie evidence, or as giving rise to a presumption that the goods were actually shipped, or in any other light, is not to my mind of materiality in the circumstances of this case. After inquiry such acknowledgment simply becomes part of the proof; its value must be tested with reference to the rest of the evidence; and the fact of shipment or non-shipment must be determined according to the import of the evidence taken as a whole. The importance of the bill of lading, as an adminicle of proof, is generally due to the fact that the statement of quantity which it contains, although not within the personal knowledge of the master, is made by him on the faith of information derived from his mate, and from servants of the ship who are employed for the express purpose of noting and checking the amount of cargo actually put on board. If there be no direct proof that, on the occasion when the disputed cargo was noted by the tallyman as

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having been shipped, there was a departure from or violation of the usual system of check followed by the ship, that circumstance is calculated to enhance the weight of the master's acknowledgment, because it tends to the reasonable inference (not necessarily conclusive) that the information conveyed to the master was correct.

I have fully considered the whole evidence in this case, both oral and documentary, with the result that I prefer the conclusion of the Lord Ordinary to that of the Second Division. After the observations made by the Lord Chancellor I do not think it necessary to enter into a detailed criticism of the proof. There is no evidence tending to shew directly that, at the time when the two parcels of jute were loaded, there was an error committed to the extent of twelve bales in the quantities noted, whether in consequence of fraud or of any other cause. That being so, the respondents' case must fail unless the other circumstances disclosed by the evidence are sufficient to warrant the inference that such error was actually committed. In my opinion, they are not sufficient for that purpose, and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD SHAND. My Lords, I am of the same opinion. The matter in controversy is one simply of fact to be determined on the evidence; and the question to be decided is whether the respondents have proved that there was a short shipment of twelve bales of jute—that is, of twelve bales less than the captain, by the terms of the bill of lading, acknowledged to have been received. The onus is clearly on the respondents to prove the alleged short shipment, not only because of the bill of lading, but because it has been proved that the quantity of bales there acknowledged was fixed after the number and marks on the bales shipped had been carefully checked by tallymen employed by the shipowners under the superintendence of the chief mate, and after the mate had himself granted receipts to the lightermen representing the shippers corresponding as to quantities with the tallymen's notes. These detailed notes—the mate's receipts and the bills of lading—all evidence of acts

by servants of the shipowners, form a strong and consistent body of proof that the shipment acknowledged under the captain's hand was actually made, and impose a heavy onus on the shipowner who alleges that nevertheless there was a deficiency, through non-shipment, in the quantity of goods shipped. What is the extent of this onus? Proof must be met by counter-proof, and that counter-proof will be insufficient if it be not strong enough to displace the consistent and clear evidence of the acts of the shipowners' own servants or employees. It will not be sufficient to shew that fraud may have been committed, or to suggest that the tallymen may have made errors or mistakes, in order to meet a case of positive proof on the other side. It must be shewn that there was in point of fact a short shipment—that is, the evidence must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped, but that in point of fact they were not shipped. Any proposition short of this would appear to me to give less effect to the evidence of the shippers than that evidence ought to have, and unwarrantably to diminish the onus which that evidence has thrown on the shipowner.

Tried by this standard, I am of opinion with your Lordships that the judgment of the Lord Ordinary was right and ought not to have been disturbed. It is said that there is a body of proof, not as to fraud or error to the extent of twelve bales in regard to the particular quantities shipped and checked in detail, but generally that the whole quantities of jute (whatever these were) shipped on board at Calcutta were carried to Dundee and delivered there. For my part, I cannot at all place such reliance on general evidence of this class as on proof of detailed and careful checking of goods as they came on board followed by the mate's receipts and the bills of lading. To do so would very much destroy the value of bills of lading even where, as here, these are supported by proof that the materials on which the bills of lading proceeded were obtained after much care and pains taken to ensure correctness of quantities; whereas if the shipowner be held to be bound or affected by the acts of his own servants, this will only tend to make them all the more

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careful in the discharge of their duties, and especially careful to avoid giving bills of lading for goods not actually delivered to their custody.

It may be quite true that the fair inference from the whole evidence here is that there was no opportunity for the abstraction of bales at the ports at which the vessel called on her homeward voyage or on her arrival at Dundee, and that such cargo as was once put into the hold remained there till the end of the voyage. But proof of all this is not sufficient for the shipowners' case. The evidence does not make it quite clear that bales to the number of twelve may not have been removed from the ship's deck after being placed there and taken away by the lighters, particularly during work carried on in the evenings after dark. The use of the steam winch and tackle would not have been necessary for this purpose. It is said this suggestion is a speculative one only; and if the onus lay on the shippers the observation would be a very weighty one. No one can say that there is proof that such abstraction did take place. But it is for the shipowners to displace the shippers' evidence furnished by the acts of their own servants. It appears to me they do not do so by proof which does not exclude the possibility that the bales in question might have been abstracted from the ship's deck, or which does not make this so highly improbable that such a suggestion must be entirely thrown aside; for if this might have taken place they have failed to discharge the onus which lies on them of adducing such evidence as is sufficient to satisfy the Court that there was actual short shipment.

On these grounds, I concur in thinking that the judgment complained of should be reversed, and the judgment of the Lord Ordinary restored.

LORD DAVEY. I concur with your Lordships that the bill of lading founded on the other documents which have been brought before us was primâ facie evidence in favour of the appellant, which threw upon the respondents the onus of displacing it by evidence that the full quantity of the goods was not in fact shipped; and, without saying that there was no

evidence, I concur with your Lordships in thinking that the burden has not been discharged by the respondents.

Judgment appealed from reversed: Judgment of the Lord Ordinary restored: and respondents to pay the appellants the costs of the action in the Court of Session and of the appeal to this House.

Lords' Journals, November 26, 1895.

Agents for appellants: *Downing, Holman & Co. for Boyd, Jameson & Kelly, W.S., Leith.*

Agents for respondents: *William A. Crump & Son for Lindsay & Wallace, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1895 *Nov.* 18; *Dec.* 7.

HUNTER DISTRICT WATER SUPPLY AND SEWERAGE BOARD . . . . } PLAINTIFFS;

AND

NEWCASTLE WALLSEND COAL COMPANY, LIMITED . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Act XXVII. of 1892, *s.* 35—*Construction—Lands outside Rateable Limit.*

Where the appellants were authorized by their incorporating Act, (XXVII. of 1892), s. 35, to make by-laws levying a water rate "in respect of lands and tenements distant not more than sixty yards from any main . . . . although such lands or premises are not actually connected with any main":—

Held, that they had no authority to levy a rate on lands without the prescribed limit merely because such lands formed one holding with other lands within the prescribed limit.

APPEAL from an order of the Supreme Court (Sept. 17, 1894), setting aside a verdict in favour of the appellants for 796*l.*, and entering the same in favour of the respondents.

The action was to recover money alleged to be due for water rates.

The facts are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., Vaughan Hawkins, and *W. A. Cozens-Hardy*, for the appellants.

Walton, Q.C., Wood Hill, and *Hanbury Davies*, for the respondents.

1895 *Dec.* 7.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellants are a "Board of Water Supply and Sewerage" for the district of the Lower

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Hunter. They were incorporated by Act XXVII. of 1892 as the "Hunter District Water Supply and Sewerage Board."

The respondents are owners and occupiers of a mining property within the district of the Lower Hunter, comprising 8772 acres of land, with a colliery in operation and a private railway connecting their works with the Great Northern Railway.

A water main belonging to the board crosses the line of the respondents' railway and runs through one corner of their land.

It is contended by the board that according to the true construction of the Act of 1892 the whole of the respondents' property, including their private railway, is rateable for water supply. This contention is disputed by the respondents, who use no water supplied by the board, whose land in some parts is above the level of the board's reservoir, and who, if the contention of the board is well founded, would apparently be liable in addition to the rate to a charge of two shillings and sixpence for every horse and every head of cattle kept on their property, and double that charge if they were to use any water supplied by the board.

This action was brought by the board to enforce their claim. There were no facts in dispute, nor was there any question as to the amount of the rate, assuming the view of the board to be correct. A verdict was therefore taken by consent for the sum of 796*l.* 9*s.* 9*d.*, which was the full amount of the rate claimed for the year, with leave for the respondents to move the Court to enter the verdict for them.

On appeal to the Supreme Court the verdict was entered for the respondents. Sir Frederick Darley C.J., with whom Innes J. concurred, was of opinion that the language of the Act was not so clear as to compel the Court to decide against the respondents "considering the extraordinary result of upholding the contention" of the board. Foster J., who dissented, thought that the verdict was a gross hardship on the respondents, but after full consideration he could not say that he had any such doubt as to the meaning of the words used by the Legislature as to enable him to agree with the rest of the Court.

The board is composed of seven members. Three who are

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styled "official members" are appointed by the Government. Four styled "municipal members" are elected—two by certain specified municipalities, and two by smaller municipalities, within the district of the Lower Hunter, grouped together for the purpose of the election. The board, as was pointed out by the learned counsel for the appellants, is not a trading corporation. It earns no profits for itself or for any of the boroughs or municipal districts within the area under its charge or for the Government. The scheme of the Act is shortly this: The water supply for a "water district"—an expression defined by the Act as meaning "the area within which water is or may be from time to time supplied by the board" (s. 2, s. 40)—is in the first instance provided by the Government. The main works are constructed by the Government and at their expense. When the works are passed and approved by the Government officer they are by a notification in the *Gazette* transferred to and vested in the board "on behalf of Her Majesty." An account is made up and the whole cost becomes repayable by the board by means of periodical payments. A similar account is made up every successive year for the whole amount expended on the works during the year. The repayments are divided into two classes, under the heads of "Permanent Works" and "Renewable Works," with different periods of repayment. When the works are vested in the board it becomes their duty to administer all matters relating to the water supply "in correspondence . . . . with the Minister"—*i.e.*, the Secretary for Public Works or other responsible Minister of the Crown—"charged with the administration" of the Act and under the control of the Governor and Executive Council (s. 31, s. 32, s. 2). It is also their duty, subject to the limitations in the Act, to levy by rates and charges a sum sufficient for the service of the year (s. 129), but no money passes through the hands of the board except for the purpose of collection and payment into the Treasury (s. 28, s. 29, s. 30). The board, therefore, in substance is a Government Department, acting under a sort of mixed commission.

For the purpose of carrying the Act into execution the board is empowered to make by-laws (s. 35). In regard to water-

supply by-laws may be made for various purposes including the following :—

"(V.) For the appointment of a scale of charges for water supplied by measure, and the minimum quantity of water to be charged for where water is so supplied.

"(VI.) For determining, making, and levying the rate to be paid in respect of lands and tenements to be supplied with water for domestic purposes otherwise than by measure, or in respect of lands and tenements distant not more than sixty yards from any main constructed by or vested in the board, although the lands or premises by or in respect of which the water is used, may be more than one hundred and fifty feet from any water reticulation pipe, or although such lands or premises are not actually connected with any main." . . . .

Omitting words which are immaterial or inapplicable to the case under consideration, the Act declares that by-laws may be made "for determining, making, and levying the rate to be paid . . . . in respect of lands and tenements distant not more than sixty yards from any main . . . . although such lands or premises are not actually connected with any main." Those are the words which seem to have given rise to so much difficulty in the Court below. The enactment says that the board may rate lands within a certain distance from their main. How can that make lands outside the limit rateable? The appellants contend that lands outside the prescribed limit are rateable when they form one holding with lands within the prescribed limit. Where is that to be found in the Act? There is nothing in the Act about lands forming one holding or being held together with other lands. There is nothing to shew that the Act intended lands in one occupation or "held as under one ownership," to use Foster J.'s language, to be regarded as one indivisible unit for rating purposes.

Foster J. indeed seems to think that the contention of the appellants is in accordance with the natural and ordinary meaning of the language used. After commenting on the expression "lands and tenements," "it would be sufficient," he says, "for the purposes of this case to treat the place rated as a tenement." "Two houses," he observes, "or two

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tenements are clearly not more distant than sixty yards from one another if the nearest parts of each are within that distance." That may be so. The leading idea in the case put by his Honour is the distance between two places. But here it is not the purpose of the enactment to define or specify the distance between two objects. The purpose is to mark out an area for taxation, which is a very different thing. For the sake of illustration, suppose there were an Act declaring that for the purpose of maintaining a sea-wall lands within the distance of one mile from high-water mark should be taxed, would anybody seriously contend that the whole of a man's park or demesne, containing perhaps a thousand acres or more, was taxable because an acre or two of it happened to lie within the area of taxation?

It may perhaps be objected that in the case supposed the tax or cess would be at so much per acre, and that consequently there would be no difficulty in arriving at the amount of the tax for any given quantity of land. Here, as it was pointed out, the tax imposed is according to the municipal valuation when the subject of taxation is within a municipality and included in the municipal valuation. That provision it was argued must create serious difficulty if the view of the respondents be adopted. Now, the first observation that occurs to one on that line of argument is this: If the respondents are right—if there is nothing in the section, by or under which the tax is imposed, authorizing a charge on lands outside the prescribed limit—why should any such lands be taxed merely because otherwise there may be a difficulty in assessing some lands which are liable to taxation? Even if the difficulty was insuperable it would be more reasonable that lands declared to be liable to taxation should go scot free than that lands outside the taxable area should be swept within the net. But the truth is that when the Act is fairly construed the difficulties presented to their Lordships in the course of the argument, such as they were, vanish altogether.

It is to be observed that the board is not "compellable to supply water to any person whomsoever" (s. 51). In every case of supply to private persons the supply is apparently in

point of law a matter of grace or of agreement. The Legislature may well have thought that a public board—in correspondence with and under the control of the executive, and in touch with the municipalities within their district—would hardly need the pressure of legal compulsion, and might be trusted to dispense the benefits at their disposal fairly and impartially to all concerned. It is also to be observed that the board is authorized to require every consumer of water to put up a meter, and a by-law has been made providing that "if the meter account exceeds the assessment calculated at the rate of two shillings per 1000 gallons," which is the prescribed rate for water supplied by meter, "then such excess shall be charged in addition to the assessment."

Now, when water is supplied by meter or for domestic purposes without meter, no question as to the sixty yards' limit can arise. That question only comes in when there is no connection with the main. In such cases, which are probably rare, having regard to the provisions of s. 68, all the board has to do is to assess the person who has failed to make a connection with the main and to assess him in respect of his property lying within the prescribed limit of sixty yards. If the valuation of that property is "included" in the municipal valuation—that is, if it is to be found there as an assessment available for the purpose of assessment by the board—then the board is to adopt the municipal valuation. If it is not included in the municipal valuation, then the board is authorized to make a valuation of its own (s. 95). But in all cases a minimum charge of ten shillings is authorized, though that charge may exceed 5 per cent. on the valuation, which is the general limit (s. 35, sub-s. vi.). When, therefore, the valuation is under 10*l.*, the precise amount is immaterial, even if the premises are occupied. If the premises are vacant the rate according to the by-laws is only 4*d.* in the pound, and then it is immaterial what the precise amount of the valuation is if it be under 30*l.*

Their Lordships were invited to approach the Act of 1892 as a confused and puzzling mass of legislation. They think it right to say that they have not found any difficulty involved in the question which has been submitted to them on this appeal.

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They will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitor for appellants: *G. M. Light.*

Solicitors for respondents: *Fooks, Chadwick, Arnold & Chadwick.*

[PRIVY COUNCIL.]

J. C.* 1895 *July* 25; *Nov.* 16.

MUNICIPAL CORPORATION OF THE CITY OF TORONTO . . . . . } APPELLANTS;

AND

VIRGO . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Ontario Revised Statutes, 1887, *c.* 184, *s.* 495—*Construction—By-laws—Power to Regulate a Trade does not include power to prohibit.*

A statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner:—

So *held*, where, under c. 184 of Revised Statutes of Ontario, 1887, s. 495, a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised.

APPEAL by special leave from an order of the Supreme Court of Canada (Feb. 20, 1894), reversing by a majority an order of the Court of Appeal for Ontario (May 9, 1893), which unanimously affirmed an order of Galt C.J. The earliest order had dismissed an application to quash s. 12, sub-s. 2*a* of by-law 2934, which amended by-law 2453, s. 12, by which amendment the original by-law was made to read as set out in their Lordships' judgment.

The case is reported in Sup. Ct. Canada Reports, vol. xxii. p. 447.

* *Present:* LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

Blake, Q.C. (Ontario Bar), for the appellants, contended that the intention of the Ontario Municipal Act (3 Revised Stat. Ont. 1887, c. 184), when its various sections were read together (see especially s. 495, sub-s. 3, and s. 503, sub-ss. 3 and 4), clearly was to commit to municipalities a full and unrestricted control and government of the class of traders affected by the by-law in question. The words used are "regulate," "control," and "prevent." Though "prevent" is not used in every section, a power to regulate includes a power of such partial prohibition as is here enacted. The by-law was passed in good faith, in the belief that the good government of the city required that hawkers should be excluded from the comparatively small area to which the by-law applied. It was unnecessary to shew the reasons on the face of the by-law; its probable object was to prevent over a limited area the nuisance of obstructed traffic and noisy demonstration. Nothing short of total prohibition in such area would be effectual. The prohibition could not be limited to such particular cases as turned out to be a nuisance. No ground was shewn for setting aside this by-law as unreasonable. [Reference was made to *Johnson* v. *Mayor of Croydon* (1); *Slattery* v. *Naylor*. (2)]

Avory and *Du Vernet* (of the Ontario Bar), for the respondent, contended that the by-law in question was clearly bad in this respect, that it dealt with all persons "named and specified" in the original by-law which it purported to amend. Those persons included numerous classes of dealers besides hawkers and pedlars, and as regards them they were outside the scope of s. 495 of the Municipal Act. The by-law was also contrary to s. 286, by which municipalities are restrained from interfering with traders except when expressly authorized. The words in the enabling section are "licensing, regulating, and governing." These powers cannot be exercised separately—the municipality cannot regulate where it cannot license. The exceptions and provisoes contained in s. 495, sub-s. 3, are introduced so as not to trench on the powers of the Dominion Parliament under s. 91, sub-s. 2, of the British North America Act, 1867, to regulate trade and commerce. To regulate trade

(1) 16 Q. B. D. 708. (2) 13 App. Cas. 446.

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apart from licensing is ultra vires the provincial legislature. A delegated authority to regulate must be construed strictly, and does not include a power to prohibit: see *Keep* v. *Vestry of St. Mary's, Newington* (1); *Dick* v. *Badart* (2); *Calder Navigation Co.* v. *Pilling* (3); *Davis* v. *Municipality of Clifton* (4); *In re Barclay and Municipality of Darlington* (5); *Reg.* v. *Johnston* (6); *In re Brodie and Corporation of Bowmanville.* (7) It was contended also that the by-law was unreasonable and unfair and in restraint of trade.

Blake, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of the Supreme Court of Canada, reversing by a majority the previous decisions of the Court of Appeal for Ontario, and of Sir Thomas Galt C.J. The question for decision is whether a section of a by-law was competently and validly made by the corporation of the city of Toronto.

The section in question is designated as sub-s. 2*a* of s. 12 of by-law 2934, in amendment of s. 12 of by-law 2453. The last-mentioned section as amended requires a licence to be taken out by—

"All hawkers, petty chapmen, or other persons carrying on petty trades, or who go from place to place, or to other men's houses, on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel or other craft, or otherwise carry goods, wares, or merchandise for sale; except that no such licence shall be required for hawking, peddling or selling from any vehicle or other conveyance, goods, wares or merchandise to any retail dealer, or for hawking or peddling goods, wares or merchandise the growth, produce or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licences, if the same are being hawked or peddled by the

(1) [1894] 2 Q. B. 524.
(2) 10 Q. B. D. 387.
(3) 14 M. & W. 76.
(4) 8 U. C. (C.P.) 238.
(5) 12 U. C. (Q.B.) 86.
(6) 38 U. C. (Q.B.) 551.
(7) 38 U. C. (Q.B.) 580.

manufacturer or producer of such goods, wares or merchandise, or by his bonâ fide servants or employees, having written authority in that behalf, and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer: nor from any pedlar of fish, farm and garden produce, fruit and coal oil, or other small articles that can be carried in the hand or in a small basket, nor from any tinker, cooper, glazier, harness-mender, or any person usually trading or mending kettles, tubs, household goods or umbrellas, or going about and carrying with him proper materials for such mending."

Sub-s. 2*a* is the only part of the by-law now complained of. It is in the following words :—

" No person named and specified in sub-s. 2 of this section (whether a licensee or not) shall, after the first day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the city of Toronto."

Then follows an enumeration of eight streets in the city of Toronto. It is stated in the evidence that these streets comprise the busiest and most important thoroughfares of the city.

The statutory power under which the corporation claim to make this by-law is contained in the Municipal Act of Ontario (c. 184 of the Revised Statutes of Ontario of 1887), s. 495, which so far as is material is in the following words :—

" The council of any county, city and town separated from the county for municipal purposes, may pass by-laws for the following purposes. . . .

" ' For licensing, regulating and governing hawkers or petty chapmen, and other persons carrying on petty trades, or who go from place to place or to other men's houses, on foot or with any animal, bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carrying goods, wares, or merchandise for sale, and for fixing the sum to be paid for a licence for exercising such calling within the county, city or town, and the time the licence shall be in force :

" ' In case of counties for providing at the discretion of the council, either the treasurer or clerk of the county, or the clerk

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of any municipality within the county with licences, in this and the previous sub-section mentioned, for sale to parties applying for the same under such regulations as may be prescribed in such by-laws:

"'Provided always that no such licence shall be required for hawking, peddling, or selling from any vehicle or other conveyance any goods, wares or merchandise, to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licences, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandise, or by his bonâ fide servants or employees having written authority in that behalf; and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer. . . .'

"(*a*) The word 'hawkers' in this sub-section shall include all persons who, being agents for persons not resident within the county, sell or offer for sale tea, dry goods or jewellery, or carry and expose samples or patterns of any of such goods to be afterwards delivered within the county to any person not being a wholesale or retail dealer in such goods, wares or merchandise."

Reference was also made to s. 503 of the same Act, which occurs under the rubric "Markets." This section empowers the council of every city, town and incorporated village subject to the restrictions and exceptions contained in the last preceding six sections to pass by-laws for: 1. Establishing markets. 2. Regulating markets. 3. "Preventing or regulating the sale by retail in the public streets, or vacant lots adjacent thereto, of any meat, vegetables, grain, hay, fruit, beverages, smallware, and other articles offered for sale."

Their Lordships are not required to construe this section, or to say whether the words "adjacent thereto" do not refer to both public streets and vacant lots, and mean adjacent to a market. Having regard to the previous sections under the same rubric they think the clause is one for the protection of the market only, and of limited application.

In the opinion of their Lordships it cannot be relied on in justification of the section now in question, and indeed the point was not pressed by the learned counsel for the appellants. It appears to their Lordships that the real question is whether under a power to pass by-laws "for regulating and governing" hawkers, &c., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised. It was contended that the by-law was ultra vires, and also in restraint of trade and unreasonable. The two questions run very much into each other, and in the view which their Lordships take it is not necessary to consider the second question separately.

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words.

Their Lordships refer (amongst others) to s. 489, sub-ss. 25, 26, 28, 29, 44, 46, 51, and s. 496, sub-ss. 3, 13, 14, and 15. The language of these sub-sections—"preventing or regulating"; "preventing or regulating and licensing"—tends to shew that the framers of the Act did not intend to include a power to prevent or prohibit in a power to regulate or govern. Several cases in the English and Canadian reports were referred to in illustration of the respondent's argument. None of these cases are direct authorities, because the statutes from which authority was derived to make the by-laws there in question were framed in terms different from the statute now under consideration. But through all these cases the general principle may be traced,

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that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

It is argued that the by-law impugned does not amount to prohibition, because hawkers and chapmen may still carry on their business in certain streets of the city. Their Lordships cannot accede to this argument. The question is one of substance and should be regarded from the point of view as well of the public as of the hawkers. The effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying their goods of or of trading with the class of traders in question. And this observation receives additional force from the very wide definition given to "hawkers" in the Act. At the same time the "hawkers," &c., are excluded from exercising their trade in that part of the city. There was no evidence, and it is scarcely conceivable that the trade cannot be carried on without occasioning a nuisance. The appellants in their printed case wisely disclaim any intention on the part of the council to discriminate against hawkers and pedlars in favour of permanent shopkeepers. No other explanation of the object of the by-laws is offered. The question, therefore, is reduced to a bare question of power.

Their Lordships on the whole have come to the conclusion that it was not the intention of the Act to give this power to the corporation. They therefore agree with the majority of the judges of the Supreme Court, and will humbly advise Her Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondent: *Poole & Robinson.*

[HOUSE OF LORDS.]

JOHNSTONE AND OTHERS . . . . . APPELLANTS;

AND

HAVILAND AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.)
1896
Feb. 17.

Scottish Law—Satisfaction—Covenant to Pay Sum of Money—Legacy of same Amount—Portions to Children—Maxim, "Debitor non præsumitur donare."

The English rule against double portions to children does not obtain in Scotland.

In an ante-nuptial marriage settlement made on the marriage of his adopted daughter the testator covenanted that his executors should within six months after his death pay the marriage contract trustees 4000*l.* with interest at the rate of 4 per cent. from his death, to be held on trusts declared by reference to the trusts of the adopted daughter's property; with the exception that on the failure of children of the marriage, before the period of vesting, the 4000*l.* should be held on trust for the testator absolutely. By the marriage contract the adopted daughter assigned to her trustees all after-acquired property. Subsequently the testator, by his trust disposition and settlement, among other "legacies and annuities" directed his trustees to pay "a legacy of 4000*l.*" to his said adopted daughter, "who shall be allowed interest at 5 per cent. on that sum so long as she shall prefer to allow it to remain as part of the share in the indigo concern":—

Held, affirming the judgment of the Second Division of the Court of Session, that by Scottish law there was no presumption that the 4000*l.* given by the will was intended by the testator to be in satisfaction of the 4000*l.* covenanted to be paid by the marriage settlement, and that the proper inference was that the legacy was given by him as an additional benefit.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

This was an action raised by Haviland and others, the respondents, as trustees of Mr. and Mrs. Strachey's ante-nuptial marriage contract, against the appellants, Johnstone and others, trustees of Mr. John Johnstone's trust disposition and settlement or will, claiming payment of a legacy of 4000*l.* and interest from December 20, 1884. The appellants contended that the legacy was not payable on the ground that it was in satisfaction of a sum of 4000*l.* settled by the testator on Mrs. Strachey in

(1) 22 Court Sess. Cas. 4th Series (Rettie), 396.

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her marriage contract of January 20, 1874, which 4000*l.* was paid on June 20, 1885.

Mrs. Strachey, whose maiden name was Jane Ellen Cooper, and who had lived with Mr. and Mrs. Johnstone since she was three years old, married J. W. Strachey in 1874.

The parties to Mrs. Strachey's ante-nuptial marriage contract, which was in the English form, were—(1.) Mr. Strachey; (2.) Mrs. Strachey; (3.) John Johnstone, the testator; (4.) Henriette M. Johnstone, the wife of the testator; (5.) the marriage contract trustees, the respondents. Mr. Strachey contributed to the fund 5000*l.*; Mrs. Strachey settled a sum called the "Jane Ellen Cooper" trust fund. This consisted of a sum of 2300*l.* provided under a power of appointment by Henriette M. Johnstone, payable at her death. The trustees were to hold this 2300*l.* along with Mr. Strachey's 5000*l.*, the income of the said sum of 2300*l.* to be paid to Mrs. Strachey during her life independent of her husband. After her death, if Mr. Strachey survived [which happened] the interest was to be paid to Mr. Strachey, and, after his death, the trustees were to hold the fund for the children of the marriage; and in the event of the failure of children before they obtained an absolutely vested interest, for Mrs. Henriette M. Johnstone herself. Mrs. Strachey undertook to settle all after-acquired property exceeding 200*l.* upon the trust declared as to the "Jane Ellen Cooper" trust property, with the exception that, failing children, the trustees were to hold the same in trust for such person or persons and for such purposes as Mrs. Strachey should by deed or will appoint; and, in default of such appointment, in trust for Mrs. Strachey if she should survive her husband; but if Mr. Strachey should survive her, then for the persons who would have been entitled under the statute of distribution.

In the same deed John Johnstone, the testator, covenanted that his executors, &c., should within six months after his death pay to the marriage contract trustees the sum of 4000*l.* with interest for the same at the rate of 4 per cent. from the death of the testator, with a declaration that the trustees should hold the same upon the trusts declared concerning the "Jane Ellen Cooper" trust property; except that if there should be no

child of the marriage who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry; and after the death of Mrs. Strachey and the determination of the trust declared in favour of Mr. Strachey after the death of his wife the trustees were to hold the fund, or so much as had not vested, in trust for the testator, his executors, administrators, and assigns. The testator also undertook during his life to pay to the marriage contract trustees 170*l.*, to be applied in the same manner as the income of the 4000*l.* would have been applicable if it had then become payable.

By his trust disposition and settlement dated February 27, 1877, the testator, John Johnstone, directed his trustees—first, to pay his debts, &c.; thirdly, to convey his lands of Halleaths to his eldest son and his heirs, &c., but subject always to the burden of the legacies and annuities mentioned in the fifth purpose. Then the fifth purpose on which the question arose was: "Fifth, I direct that my shares and interest in the East India indigo concerns, presently carried on under the name of . . . . shall be held and applied as follows, it being my wish that the same shall be allowed to stand in the name of my son Andrew John Scott Johnstone, with power of sale and in trust for" the purposes mentioned. After providing one-fourth share to his son Charles, and one-fourth for three of his daughters, the testator directed that "the remaining two-fourth shares and income thereof shall be sold, if necessary, and the proceeds applied in paying the following legacies and annuities, videlicet:—500*l.* to my said wife at the time of my death; an annuity of 400*l.* to her during her life; an annuity of 300*l.* to Mrs. Louisa Popham, residing in London . . . .; and a legacy of 4000*l.* to Jane Ellen Strachey, residing at Bognor, who shall be allowed interest at 5 per cent. on that sum so long as she shall prefer to allow it to remain as part of the share in the indigo concern." As to the above annuity to Mrs. Popham, there was a previous bond for 300*l.* dated June 13, 1871, by which the testator became bound to pay an annuity after his death during the life of Mrs. Popham.

The testator died on December 20, 1884. Mrs. Strachey died on December 28, 1889, leaving her husband and two children

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surviving. Mrs. Henriette M. Johnstone was alive at the date of the action. On June 20, 1885, the appellants paid the respondents 4000*l.* with interest at 4 per cent. from the testator's death. The respondents maintained that the legacy with 5 per cent. was still due.

In 1886 an application was made by originating summons in the Chancery Division, England, in the matter of Mr. and Mrs. Strachey's marriage settlement, the result of which was a declaration that the trustees of the settlement were not bound to take any proceedings in respect of the 4000*l.* legacy unless when specially required by some person for the time being interested. The costs of the plaintiffs and defendants were ordered to be paid out of the marriage settlement funds. Thereafter, on September 6, 1887, the testator's trustees agreed with Mr. and Mrs. Strachey to pay the costs, 154*l.* 4*s.* 5*d.*, out of the funds held by them as testamentary trustees. There was a stipulation that the sum should be repaid if any action was taken for payment of the legacy of 4000*l.* It appeared Mr. and Mrs. Strachey were not parties to the proceeding in the Court of Chancery.

The Lord Ordinary (Kyllachy) on December 22, 1894, held that the legacy was in satisfaction of the obligation in the marriage contract, and that a second 4000*l.* was not due to the respondents.

On February 22, 1895, the Second Division of the Court of Session (Lord Young delivering the opinion of the Court) recalled the Lord Ordinary's interlocutor, and ordered the appellants to pay the legacy of 4000*l.* with interest at 4 per cent. from December 20, 1884.

Feb. 14, 17. *Henry Johnston* and *C. K. Mackenzie* (both of the Scottish Bar), for the appellants. The true effect and intention of the testator's bequest or legacy were to satisfy his obligation under his covenant in the marriage contract. Both sums were the same in amount. The will was dealing with the whole estate, and its scheme was to resume the whole obligations of the testator, as in the case of sundry of his marriage contract obligations, Mrs. Popham's annuity, and the

present provision for Mrs. Strachey. According to the law of Scotland, when a provision by one in the character of parent rests in obligation the presumption is that a subsequent gift equal in amount and the same in character is a satisfaction of the existing obligation and not in addition to it. In such a case the maxim "Debitor non præsumitur donare" applies, and will receive effect unless there is found in the later deed other words shewing that the testator intended the second sum to be in addition to the first provision: *Kippen* v. *Darley*. (1) See Lord Chelmsford L.C. (2) and also Lord Cranworth, who said, alluding to the presumption against double portions, "There is such a presumption in the law of Scotland as exists in England." (3) In *Nimmo's Case* (4) a daughter had been provided by her father in a certain sum in her marriage contract payable at his death, and a sum of a similar amount was afterwards provided by the father's trust disposition. It was held that there was nothing to disturb the maxim, and that she was not entitled to both provisions. The English cases are exactly on the same lines as the Scottish. The presumption in England against double portions is that the obligant is doing no more than fulfilling the obligation: *Weall* v. *Rice* (5); *Thynne* v. *Glengall* (6); *Chichester* v. *Coventry*. (7)

[LORD WATSON referred to Lord Deas in *Kippen* v. *Darley*. (8)]

The testator had an idea that by leaving this bequest he was fulfilling what was incumbent upon him. He believed that he had come under obligation to provide Mrs. Strachey by his will with 4000*l*., and the appellants ask now for a remit that evidence may be gone into as to whether the testator was under this belief: *Ex parte Pye* (9), and *Booker* v. *Allen* (10) there cited. Those cases also shew that a slight alteration in the words of the second bequest makes no difference.

[LORD HALSBURY L.C. mentioned *Hall* v. *Hill*. (11)]

(1) 3 Macq. 203.
(2) 3 Macq. p. 232.
(3) 3 Macq. p. 242.
(4) 3 Court Sess. Cas. 2nd Series (Dunlop), 1109.
(5) 2 Russ. & My. 251, 268.
(6) 2 H. L. C. 131.
(7) L. R. 2 H. L. 71.
(8) 18 Court Sess. Cas. 2nd Series (Dunlop), p. 1186.
(9) 2 W. & T. 5th ed. 377; 6th ed. 401–2.
(10) 2 Russ. & My. 270.
(11) 1 Dr. & War. 94.

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As to interest, Mrs. Strachey died in 1889, and her representatives are not here. There is therefore no one in titulo to sue for it.

[LORD WATSON. There is no plea as to that.]

There is, at all events, a plea as to the rate of interest. The estate has not earned 4 per cent.; and, as the respondents did not claim the legacy before, they ought not to get so much as 4 per cent.

[They also cited *Balfour* v. *Balfour's Trustees* (1), *Inglis Trustees* v. *Breen* (2), and the case of *Baird's Trustees.* (3)]

The Solicitor-General for Scotland (*A. Graham Murray, Q.C.*), *Dickinson*, and *J. D. Sym* (the former and latter of the Scottish Bar), for the respondents, were not called upon.

LORD HALSBURY L.C. In this case the question is susceptible of a very short solution. Had the English rule of law prevailed, I am not quite certain that we should not have been involved in this case in a good many difficulties; what the ultimate decision might have been it is immaterial to inquire. The English law, of course, is now established, as Lord Wensleydale said in *Kippen* v. *Darley* (4): "The rule is now by a long course of decisions firmly and fully established and cannot be disputed." He adds, what I entirely concur with, "and any comment upon it would now be worse than useless." But after the decision of *Kippen* v. *Darley* it is no longer competent to your Lordships to assume that the rule of law—the presumption arising from what are called double portions—is applicable to the law of Scotland. That was a decision upon that very question in this House, and we are, therefore, remitted to the simple question as it arises under Scottish jurisprudence.

Now, although the two sets of provisions are very different, both in their application and in the decisions upon them, there is one observation which was made by Sir John Leach with reference to the English rule which is, to my mind, applicable to the Scottish rule. Sir John Leach said in *Weall* v. *Rice* (5):

(1) 4 Court Sess. Cas. 2nd Series (Dunlop), 1044.

(2) 18 Court Sess. Cas. 4th Series (Rettie), 487.

(3) 19 Court Sess. Cas. 4th Series (Rettie), 1045.

(4) 3 Macq. 258.

(5) 2 Russ. & My. at p. 268.

"It is not possible to define what are to be considered as slight differences between two provisions." "Slight differences," he adds—and one cannot help observing that after the learned judge had said it is not possible to define, he begins with something like a definition—"are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question"—of what are slight differences—"for himself." My Lords, I believe that to be perfectly true as applicable to the construction of the instrument now under your Lordships' consideration, and although I propose to mention one or two differences between the two provisions, I protest against anybody hereafter arguing from the particular provisions to which I refer that I am laying down, or affecting to lay down, any general proposition which governs other instruments. I am speaking of this instrument with all its circumstances, with all its conditions, and the language which I find therein. There is no greater source of error than, where you have been dealing with one instrument, and dealing with it upon what are general principles of construction, and pointing to the particular provisions of it as exhibiting the necessity of applying those general principles of construction, to apply any observations made with regard to the particular language used or the particular circumstances in which the language is used as amounting to a general canon of construction which is applicable to all other instruments whatsoever, though the language may be different, though the collocation may be different, and though the circumstances with which the instrument is dealing may be entirely different. I am, therefore, only endeavouring to construe this particular instrument; and when I look at the two instruments in this case, it appears to me that they differ in very material particulars. There is in the one instrument the language of gift. There is in the other instrument the language of obligation. And I find that where the two things are dealt with they are dealt with differently. In the first deed the obligation is an obligation to the trustees; whereas in the second deed the gift is a gift to the lady herself. And although it may be perfectly true that the gift to the trustees was for the benefit of the lady

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herself, I am endeavouring to find out from the language of the instrument itself what was in the mind of the testator at the time when he wrote those words; and I cannot doubt that the person who writes these words has in his mind the fact that the provision he has already made for the trustees is a different thing from giving to the lady herself. And although it will, indeed, by a circuitous process, perhaps, come round to the trustees, yet it is not the same thing. Therefore, when I am asked to say whether these two are to be read as one, and the one is to be in substitution for the other, I cannot entertain the smallest doubt that the person who wrote these words was under the impression that he was doing what he said he was doing—making a gift, and not implementing the obligation into which he had already entered.

For these reasons—and they are very short and simple ones—it appears to me that we must affirm the judgment of the Court below; and I confess it seems to me that it would be very difficult, getting rid as I say of the confusion that has arisen in some of the English cases from a different rule of law, to suggest that anybody can read these two documents and suppose that the one was intended to be in substitution for the other. That seems to me to be enough to say on the principal argument addressed to us, long as that argument lasted.

With regard to the question of interest, I entirely decline to deal with that. I neither understand that any such question was properly raised in the Court below, nor that there are any materials upon which your Lordships could properly entertain the question again. The fact that interest of some sort or other was admitted to be due, or was not contested to be due, is conclusive against the point as to there being any right to recover it; and if it comes to be a mere question of the amount of interest which ought to be allowed, I have neither the materials nor does there appear to be any ground for altering what the Court has already done.

For these reasons I submit to your Lordships that the proper judgment is, that the interlocutor should be affirmed, and the appeal dismissed with costs.

LORD WATSON. I agree with the Lord Chancellor in thinking that there is according to the law of Scotland no presumption which necessarily governs the decision of the present case. The Court have to consider together the obligatory provision made in favour of Mrs. Strachey by her marriage contract, and the voluntary provision which is made in her favour by the will of the late Mr. Johnstone; and to determine whether the testator meant to substitute the second of these provisions for the first of them. I think the only materials to which we can legitimately refer in deciding that question are, first, the terms of the marriage contract, and, in the second place, the terms of the settlement, which must be read in the light of a known maxim of Scottish law, "Debitor non presumitur donare." But that maxim will only prevail in cases where, according to the opinion of the Court upon the terms of the documents, the construction of the will favours the substitution of a new and substantially similar provision for the onerous provision which had been previously made in the marriage contract.

My Lords, with regard to this case, having indicated the view which ought to be taken in considering it, I have only to add that I agree in the conclusion which has been expressed by the Lord Chancellor. Primâ facie, there is the gift as a legacy. I do not say that is sufficient by itself, but in this case it is coupled with such differences in the character of the two provisions that the one cannot in my estimation be held to be in substitution for the other.

With regard to the tender of evidence made by the pursuer at the Bar, whatever authority there may be for the admission of such evidence in the law of England, it is contrary to the rules of the law of Scotland. The other points pleaded by the learned counsel were very technical, and are open to this objection, that they are not pleaded on the record, and were not considered by the Court below.

LORD HERSCHELL. I am of the same opinion. I think the maxim which has been so often referred to is a maxim which embodies common sense; it is only this: that a debtor is not

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presumed to make a gift. That is, of course, very far from implying that he may not perfectly well make a gift. I take it to mean this and this only: that where a debtor makes a disposition of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of his obligation. But if there are circumstances which indicate that he did not intend it to be a mere discharge of his obligation, but intended to benefit the creditor and so make that person an object of his bounty, then it is just as effectual as though no such relationship existed between them. It comes then to be a question of fact to be determined in each case, whether there is enough to shew that he did not intend the disposition to be in satisfaction of his obligation, but did intend it to be a gift.

I agree with my noble and learned friends who have preceded me that there is ample to shew this in the present case. I am not going over the circumstances again beyond stating that my mind is influenced not by one thing alone, but by a combination of things—by the fact that it is described as a "legacy," by the circumstance that it is given to the lady, and not to the trustees to whom the obligation was; and if it be said in answer that the testator would know that giving it to her was the same thing as giving it to the trustees because of the covenant she had come under, then I say, in reply to that, you must again take into account the fact that he gives it coupled with a benefit or privilege which she could not enjoy if those trusts were carried out. Taking all those considerations together, I am satisfied that it was intended to be a gift and not in satisfaction of an obligation.

LORD MACNAGHTEN. I am of the same opinion. I do not think effect could be given to the argument on behalf of the appellants without overruling directly or indirectly the judgment of this House in *Kippen* v. *Darley*. (1) Once it has been established that the rule against double portions does not obtain in Scotland, it appears to me there is no substantial ground on

(1) 3 Macq. 203.

which it can be contended that the obligation of the marriage settlement has been extinguished by the will.

LORD MORRIS. I concur.

LORD SHAND. I am also of the same opinion. I think there can be no doubt that according to the law of Scotland in a case of this class the maxim "Debitor non præsumitur donare" has a direct application in the first instance. The testator had three years before he made his will come under an obligation to pay a sum of 4000*l.* to marriage contract trustees for behoof of Mrs. Strachey and any children of the marriage. When we find that three years afterwards when he made his will he gives the lady the same sum, I think the presumption is against donation. Accordingly, if there had been here a mere direction to the trustees to pay the money to the marriage contract trustees or even to herself, and nothing beyond that, or if the words used were not to be held by implication to go further, the maxim would have received effect. But, my Lords, the language of the will, I think, shews that he did not intend merely to discharge a debt but to confer an additional benefit. Your Lordships have referred to most of the circumstances which lead to this inference, and I shall not enlarge upon them, but they are mainly these: In the first place, there is the use of the word "legacy." As to that I agree with what was said by Lord Moncreiff in the *Balfour Case* (1), which has been referred to, that though that is not necessarily conclusive, it must be held to be of great weight in a case of this kind. It rather implies gift than payment of debt. But in addition to this we have, as has been pointed out, the circumstance that the two sums are payable to different persons, namely, the provision to the trustees of the marriage contract, and the legacy to Mrs. Strachey herself. Then what seems to me to be much more material is the further fact, that in giving this legacy there are two benefits or advantages given to Mrs. Strachey which she never could have had under the marriage contract. The first of these is that the legacy when given by her to the marriage

(1) 4 Court Sess. Cas. 2nd Series (Dunlop), 1044.

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contract trustees under her obligation to transfer acquirenda to them is to be held on a different destination from that of the marriage contract provision. The ultimate destination under the marriage contract in case of the failure of issue is that the sum provided is to revert to Mr. Johnstone's heirs; while the destination under the will would, failing children, leave the legacy at the disposal of Mrs. Strachey herself. In addition to that, as has been pointed out, the testator has expressly altered the rate of interest in the two cases. Under the marriage contract 4 per cent. is fixed as the limit; while under the will Mrs. Strachey has a right to have 5 per cent. by leaving the money bequeathed to her in the indigo business. Under these circumstances I am of opinion that it is a matter of direct inference that the testator intended to confer and has given an additional benefit by his will.

It has been said that there are other provisions in the same clause which tend to shew that the testator was only providing for the fulfilment of his obligation under the marriage contract. In the same clause which provides for the legacy to Mrs. Strachey there is a direction to pay an annuity of 300*l.* to a lady to whom he was under an obligation by a bond of annuity for that amount. The appellants' counsel maintains that in the case of this annuity there is clearly no duplication, but a provision only for fulfilment of the testator's obligation, and for the purpose of the argument this may be assumed to be so. There are obviously considerations which support the view that the legacy to Mrs. Strachey is an additional benefit which do not apply in the case of the annuity, in the use of the word "legacy" and the other circumstances to which I have specially referred. But whatever may be said of the direction as to the annuity, there is in the same clause also a provision in favour of the testator's widow which, like the legacy to Mrs. Strachey, gives her additional benefits beyond those for which he was under obligation to grant. I have only to add that I think there has been no sufficient ground shewn for disturbing the judgment of the Court with regard to the rate of interest.

I entirely concur with what has been said by my noble and learned friend Lord Watson, that such evidence as was

proposed to be led could not be admitted under the law of evidence in Scotland. It is said that the evidence is not proposed for the purpose of shewing the intention of the testator —we are to gather that from the deed—but for the purpose of shewing that he used the word "legacy" in a sense that was not its ordinary sense, and I think that evidence for such a purpose, that is for the purpose of substituting the word "provision" for the word "legacy" used by the testator, is clearly inadmissible.

On these grounds I am of opinion with your Lordships that the judgment appealed against should be affirmed.

Ordered and adjudged, that the interlocutor of February 22, 1895, complained of be affirmed: Further ordered, that the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal.

Lords' Journals, February 17, 1896.

Agents for appellants: *Preston, Stow & Preston, for J. C. & A. Steuart, Edinburgh.*

Agents for respondents: *Janson, Cobb, Pearson & Co., for J. & J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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LITTLE . . . . . APPELLANT;

AND

STEVENSON & CO. . . . . RESPONDENTS.

Ship—Charterparty—Damages by way of Demurrage—Lay Days—Judicature (Scotland) Act, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.

By charterparty it was provided that the *River Ettrick* should proceed to Bo'ness and receive a cargo of coal, to be supplied by the charterers, and brought alongside within sixty running hours, demurrage to be paid at a specified rate, "lay days to count from the time the master has got ship reported berthed and ready to receive cargo, and given notice of the same in writing to the charterers." On October 17 the shipowner informed the charterers that the *River Ettrick* had left Harwich for Bo'ness, and asked them to supply cargo for October 19. On October 19, at 8.30 A.M., the ship arrived in the roads of Bo'ness, but in consequence of the crowded state of the docks she was not allowed to enter. Her arrival was wired to the charterers. On October 21 a loading berth became vacant owing to the cargo of an earlier arrived vessel not being forward. If a cargo had been then ready for the *River Ettrick* she would have been allowed to enter the dock, but her cargo was not ready. Eventually, she was docked on the 26th, berthed for loading on the 27th, and sailed on October 28.

The shipowner recovered from the charterers, in an action raised in the Sheriff Court, Scotland, damages by way of demurrage for the detention of the ship from October 21 until the time when the cargo was ready. Upon appeal to the Court of Session the judgment was reversed. The fact that there was a berth vacant on the 21st was not set out in the interlocutor of the Court of Session in accordance with the Scottish Judicature Act, 1825, but this fact was to be found in the opinion of the judge delivering judgment:—

Held, by the House of Lords, that to carry out the spirit of the Scottish Judicature Act all the facts ought to be found by the interlocutor appealed from; but, secondly, it made no difference in the result, for assuming the facts to be as found, the shipowner had no cause of action, for there was no obligation on the part of the charterers to have a cargo on the quay, ready for loading, on the off chance of a berth becoming vacant.

APPEAL against an interlocutor of the Second Division of the Court of Session, Scotland. (1)

The appellant, James W. Little, shipowner, raised this action in the Sheriff Court against the respondents, D. M. Stevenson &

(1) 22 Court Sess. Cas. 4th Series (Rettie), 796.

Co., coal exporters, Glasgow, for damages by way of demurrage for the alleged detention of the appellant's steamship *River Ettrick* at Bo'ness in October, 1893.

By charterparty dated October 5, 1893, entered into between the appellant and the respondents as charterers, it was agreed that the *River Ettrick* should "proceed as soon as possible to Bo'ness" (otherwise Borrowtownness on the Firth of Forth) and "there receive in one or more lots as ordered, at the berth pointed out by the charterers' agent if required, a full cargo of coals. The charterers hereby agree to supply the said coal. The ship to be consigned to the charterers' agent. The coals to be brought alongside in forty-eight (afterwards arranged to be sixty) running hours. If longer detained, demurrage to be paid at 12*s.* 6*d.* per hour, unless detention arises from lock out" [then followed certain exceptions]: "Lay days to count from the time the master has got ship reported berthed and ready to receive cargo, and given notice of the same in writing to charterers' agents during business hours; but loading not to count during idle time or holidays, &c."

Bo'ness had a tidal harbour and dock, but, it appeared, only four coal-loading cranes.

On October 17 the appellant wrote to the respondents, advising them that the *River Ettrick* left Harwich that day for Bo'ness, and adding: "Please arrange to have coals forward for Thursday (that was October 19) and dispatch her as quickly as possible." The *River Ettrick* arrived at Bo'ness at 8.30 A.M. on the 19th; on that day the Bo'ness agent who acted for all parties, including the colliery owners, Messrs. Nimmo—with whom the respondents had booked the vessel—wired the respondents, "*River Ettrick* arrived in roads hurry forward cargo," his telegram being confirmed by letter. On the 20th the agent opened up traffic with the railway company. When the *River Ettrick* arrived, the docks being crowded, she was not allowed to enter the dock. On the 21st a coal-loading berth had become vacant in consequence of cargoes not being ready for ships which had arrived before the *River Ettrick*; and if the latter's cargo had been ready she would have got that berth. This fact, though included in the interlocutors of the sheriffs and in the opinion

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of Lord Trayner, was not found in the interlocutor of the Court of Session in accordance with the Scottish Judicature Act, 1825. On October 26 the *River Ettrick* was docked; she was berthed on the 27th and loaded; and sailed on October 28.

It appeared from the evidence of the harbour-master of Bo'ness "that steamers are put on turn as they arrive and captain has reported his vessel to harbour-master. If a steamer is on turn for a hoist and there is no coal for her, the next steamer on turn takes the loading berth and retains the same till she is finished, provided her cargo is alongside."

The appellant contended that the respondents were responsible for the delay on the 21st.

By condescendence 4 he stated that the *River Ettrick* should have been berthed, according to her regular turn, by noon of October 20 at latest; but owing to the delay of the defenders, or those for whom they are responsible, in not providing for the steamer getting her regular turn at the cranes to load, and in not having cargo forward and ready for loading, the said vessel was not allowed into dock until October 26 at 2.30 P.M., and she was not loaded till October 28 at 4 P.M. The respondents explained "that the harbour-master of Bo'ness refused to allow the *River Ettrick* to enter the harbour in consequence of the number of vessels there already, which was a cause of detention beyond the defenders' control."

"Condescendence 5. In consequence of the said delay of the defenders or those for whom they are responsible, the *River Ettrick* was detained for ninety-four hours more than she ought to have been in loading, which at the rate of 12*s.* 6*d.* per hour amounts to 58*l.* 15*s.*, being the sum sued for, which fairly represents the amount of the damage sustained by the pursuer through the defenders' delay." The respondents answered: Demurrage not due for detention arising from lock out, strikes, &c., or any cause beyond their control. Further, that lay days were to count from the time the master had got ship reported berthed and ready to receive cargo, and given notice of the same in writing to the charterers; that October 19 was the usual idle day at Nimmo's colliery with whom the ship was booked. They also stated that the delay was in consequence

of the partial strikes which prevailed between Messrs. Nimmo and their men, which were beyond the respondents' control.

The respondents offered 19*l.* 7*s.* 6*d.* as a settlement.

On August 1, 1894, the Sheriff Substitute (Balfour), after a proof in which the above facts were proved, and which were set out in his interlocutor, found the appellant entitled to 49*l.* 7*s.* on the basis of the lay days commencing on October 21 at 6 A.M. On March 30 the Sheriff (Berry) affirmed the Sheriff Substitute's interlocutor, but reduced the damages to 47*l.* 10*s.*

On June 26, 1895, the Second Division of the Court of Session pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: recal also the interlocutor of the Sheriff Substitute, dated 1st August, 1894: find that by charterparty dated 5th October, 1893, the defenders chartered from the pursuer the steamship *River Ettrick* to carry a cargo of coal from Bo'ness to King's Lynn: find that the coals were to be brought alongside in 48, or as was afterwards arranged 60 running hours, and if longer detained demurrage to be paid at 12*s.* 6*d.* per hour unless detention arose from certain specified causes: find that it was further provided that lay days were to count from the time the master had got the ship reported berthed and ready to receive or deliver cargo, and given notice of the same in writing to the charterers or their agents during business hours, say between 9 A.M. and 5 P.M.: find that the vessel arrived in Bo'ness roads on the 19th day of October, but was not able and was not allowed to enter said dock on account of the crowded state of the dock until the 26th of October, which day she was docked, at 2.30 P.M.: find that the loading of the vessel was completed on 28th October, at 4 P.M.: find that the *River Ettrick* did not arrive at her charter port of shipment, and that the lay days did not begin to run until the said 26th day of October, when the *River Ettrick* got into the dock: find further that no notice was given in terms of the said charterparty to the defenders that the vessel was reported berthed and ready to receive cargo: find that the defenders are not liable to the pursuer in any sum in name of demurrage: therefore assoilzie the defenders from the conclusions of the summons and decern:

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find them entitled to expenses in this and in the inferior Court."

Lord Trayner, who delivered the opinion of the Court, said: Notwithstanding the crowded state of the dock it happened that a loading berth became vacant on October 21 in consequence of cargo not being forward for the vessel then entitled to the berth. The harbour-master explains that if the coal had been forward for the *River Ettrick* she would have got that berth although it would have been given to her "out of her turn, because there were other steamers before her," but the *River Ettrick's* cargo was not forward, and accordingly she did not get that berth. His Lordship then said he would have been of opinion that the appellant was entitled if the *River Ettrick* had been in dock: for he was not prepared to sustain the contention that it was of the merest chance that a berth became vacant on October 21. The charterers or shippers of the goods take the risk of all contingencies which may befall the ship in the case where there are stipulated lay days and the ship is in the usual and ordinary place, for shipment or discharge of cargo. But that at Bo'ness the usual place of shipment is the docks; and, accordingly, until the *River Ettrick* had got into the docks she had not arrived at her charter port of shipment. Further, that a crowded state of dock, preventing a ship from entering the docks, is a risk which falls on the shipowner; therefore the lay days had not commenced on the 21st. And, again, that no notice was given in writing that the ship was reported berthed and ready to receive cargo.

March 19. *Joseph Walton, Q.C.*, and *Leck*, for the appellant. On the 21st there was a berth available for the *River Ettrick*, but owing to the fault of the respondents she did not get that berth.

[*Bigham, Q.C.*, for the respondents. The fact that there was a berth vacant on the 21st is not found in the interlocutor appealed from, and this House is bound by the facts found therein. If an attempt is made to vary the facts found, then the Judicature Act of Scotland, 1825, s. 40, applies. (1)]

(1) Sect. 40: "That when in causes commenced in any of the courts of the sheriffs or of the magistrates of burghs or other inferior courts, matter of fact

Walton, Q.C., for the appellant. It is admitted that there is no appeal as to the facts found. It was held in *Mackay* v. *Dick* (1) that in appeals falling within the 40th section of the Judicature Act of Scotland, 1825, this House has no concern with the proof led in the sheriff court. But when it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions; but that can only be shewn by a reference to the record and not to the proof. Now, the fact that a berth was vacant on the 21st is stated and is commented upon in Lord Trayner's judgment. It was not included in the interlocutor because it was not considered important; but if the appellant is right the fact becomes important and material. The claim of the appellant is not for demurrage, but for damages for failure on the part of the respondents to supply the cargo. They agreed to load the ship at a port named, and the shipowners could not load the cargo until it was there ready. In *Gilroy, Sons & Co.* v. *Price* (2) the finding was not satisfactory, and it was intimated to the parties that either there must be a remit, or they must agree to this House taking the facts as found in the judges' opinions. In *Lilly & Co.* v. *Stevenson* (3), on a very similar charterparty, the charterer was held liable by the Court of Session on the ground that the ship could have been berthed on a certain day but for the fault of the charterers in not having a cargo ready. In one sense the ship was prevented because

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shall be disputed and a proof shall be allowed and taken according to the present practice, the Court of Session shall in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found or on matter of law; and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on, or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

(1) 6 App. Cas. 251.

(2) [1893] A. C. at p. 60; see also *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. at p. 112.

(3) 22 Court Sess. Cas. 4th Series (Rettie), 278.

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the dock was crowded, but she would have got a berth at once if the cargo had been forward. And if one may refer to the evidence, as a part of the argument, it is shewn that the harbour-master only puts a vessel in berth when her cargo is ready; therefore the charterer is bound to do all in his power necessary for the ship to get a berth; otherwise she would be kept indefinitely. In *Mackay* v. *Dick* (1) Lord Blackburn said: "Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." The only fact upon which the appellant proposes to rely is the fact found in the judgment.

[LORD HERSCHELL. If you make good that point you must also make good the point that the custom of the place was that owing to the frequency of the occasions on which other ship's cargo was not there, a duty was cast upon the respondents to be prepared with cargo. But you have not pleaded that.]

The ship was ready and willing to go straight into the dock. There was no difficulty except the want of cargo: see Lord Selborne in *Grant & Co.* v. *Coverdale, Todd & Co.* (2) Here the respondents have not protected themselves against the peculiar character of the loading at Bo'ness.

[Their Lordships consulted, and decided to call on the counsel for the respondents.]

Bigham, Q.C. (with him *Boyd* and *J. J. Cook*, the latter of the Scottish Bar), for the respondents. The contention of the appellant is that there was a duty cast upon the charterers to take advantage of any irregular time of lading should it arise; and a judgment in *Lilly & Co.* v. *Stevenson* (3) by the same judge as in this case is cited against the respondents. But this contention cannot be maintained. The interlocutor finds that the ship arrived at Bo'ness on the 19th, and was unable to

(1) 6 App. Cas. at p. 263.
(2) 9 App. Cas. at p. 475.
(3) 22 Court Sess. Cas. 4th Series (Rettie), 278.

enter the docks owing to their crowded state. This bald statement of fact shews that it was impossible for the ship to have got a berth, and this House is not entitled to go outside of that finding. Secondly, no case was made in the pleadings that the respondents ought to have been ready to take advantage of the off chance of a berth being vacant. The ship's regular turn of loading did not happen on October 21. It is admitted that the respondents ought to have had their cargo there to load according to the custom of the port; but to make that custom out lies on the appellant. The only case made is, that the respondents prevented the ship from getting her regular turn. There were thirty vessels in the dock waiting to load. Suppose No. 1 not ready and so on to the 30th. If the appellant is right all these charterers ought to have their cargo ready. That is, the respondents were bound to have their cargo lying on the quay the moment the ship arrived in the roads; possibly in the rain; it might be a cargo of any description of merchandise. Certainly, such a conclusion would abrogate the condition as to the supply of cargo within sixty hours.

Walton, Q.C., in reply. The appellant contends that the charterer must be always ready with his cargo at all times and in all places, and under all circumstances, to take advantage of a berth being vacant.

LORD HALSBURY L.C. I confess that I myself am under a very strong impression that it is not open to the appellant here to raise the argument which has principally occupied your Lordships' attention. I think the language of 6 Geo. 4, c. 120, s. 40, is very material indeed, which is: [His Lordship read the section given ante, p. 112, and continued:—]

I confess I cannot read those words as allowing the possibility of placing in the interlocutor as found a new set of facts which may make the language ambiguous. As they stand they are supposed to be exhaustively disposing of the facts. It appears to me that the interlocutor is absolutely inconsistent with the argument as presented to your Lordships on behalf of the appellant. It may not, however, be necessary to determine that question, because I am not certain that we are all agreed upon

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this subject; but on the argument presented before us I cannot understand there being any doubt at all.

This action is not raised upon any specific provision in the charterparty at all. The contract relations between the persons who entered into that contract do not specifically apply to the case now suggested to be open to the appellant to argue. What is suggested is this—not that the provision in respect of demurrage ever in fact arose, because it certainly did not arise, but that inasmuch as there was a default on the part of the shippers to provide coal, which default by a series of causes prevented the vessel obtaining her berth, therefore the default was in the shippers, and accordingly the shipowners have made good this claim.

Now when one comes to examine the series of propositions which establish that cause of action it comes to this: it is true that the provision for demurrage in the charterparty itself never arose. The ship got to Bo'ness on the 19th in the roads. As a matter of fact she never got into the dock, and never got into a berth ready for loading until October 26. But the harbour-master gave evidence that if there had been a cargo ready she might have got in sooner. A vessel had forfeited her right to continue at her berth according to the harbour-master's views because she had not completed her loading, and therefore he sent her away from the berth at which she was lying. If all this had been known to the parties, and if the harbour-master had in his discretion allowed the *River Ettrick* to come, as I understand he says he would have allowed her to come in, then this vessel might have got in on the 21st.

That is the proposition of fact. The proposition of law is that a merchant must be always ready with his cargo at all times and in all places and under all circumstances to take advantage of any such contingency if it should arise. There is not a fragment of authority for any such proposition. And I can imagine it would be a most serious thing if such a proposition were supposed to be laid down to regulate the mercantile community, because it might very seriously imperil the conduct of merchants in their business if it were to be supposed that all those twenty or thirty ships (for it is said there were twenty or

thirty ships there) were guilty of a breach of an implied duty (the charterparty being in the ordinary form) in not having all their cargoes ready. I think I am entitled to say that no such case has ever been suggested in the courts. I therefore move your Lordships that this appeal should be dismissed with costs.

LORD HERSCHELL. I am of the same opinion. The question which the appellant seeks to raise at the Bar is not raised by any finding of fact in the interlocutor. The utmost that could be done under any circumstances would be to remit the case with the view of having the facts which raised the point, if they were facts that had been really found in the appellant's favour in the Court below, inserted in the interlocutor. If the findings in the interlocutor are at variance with and contradict the facts which it is sought to have found, then, of course, there would be no ground for sending the case back. This House would be bound by the findings in the interlocutor. I cannot help saying this, that being very desirous of not in any way departing from the spirit of the statute which prevents appeals to this House except upon facts found in the interlocutor, I think it would be extremely desirable that in the case of these appeals from the Sheriff's court all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor.

Now, in this case, the facts raising one point of law, which was discussed and debated, and upon which a decision was pronounced in the Court of Session, are not found in the interlocutor at all. Whatever may be the true construction of the later words, and even if, looking at them alone, they are inconsistent with those facts, it is obvious, and no one can read the judgment without seeing, that they were not intended to be inconsistent with them; and that in truth the facts relating to this point are not found at all. It is true that the Court below decided the question against the appellant on another and a different ground altogether; but it seems to me that that was no reason for abstaining from finding in the interlocutor those facts upon which not only a point of law depended, but a point of law which was decided in favour of the appellant. I think

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they should have been stated, because although, for reasons which I will give in a moment, I do not think they would have been sufficient, differing as I do from what was said by Lord Trayner, to entitle the appellant to judgment, yet at the same time it was a matter for discussion here, and a different view might have been taken of the point on appeal.

It is not necessary to say whether the finding as worded in the latter part of the interlocutor is inconsistent with those facts or not, because I am of opinion that, even supposing all the facts upon which the learned counsel for the appellant rely were stated, there would be no case made out for disturbing the judgment of the Court below. The case suggested on behalf of the appellant is this: by the charterparty the ship was to proceed to Bo'ness, and she was to load at a berth to be selected by the charterer, and the lay days were to count from the time when she was berthed, and notice was given to the charterer. Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part, according to the custom of the port, to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth, when she was not there because the charterer himself had failed in his duty to do some act on his part to enable her to get there. The appellant's case, therefore, is put in this way. It is said, although she did not get into a berth until October 26, she might have got into a berth on the 21st if the respondents had done an act which they failed to do, namely, had a cargo ready there. That arises in this way: in ordinary turn she could not have been berthed until the 26th, but, owing to a vessel which was in berth not having her cargo there, the harbour-master would have put the *River Ettrick* into that berth if her cargo had been ready to be immediately put on board. The question is whether on these mere facts there was an obligation on the part of the charterer to have the cargo on the quay so that the vessel might have been berthed on the 21st. It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate

such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be in short, that was an obligation always resting upon the shipper.

My Lords, no authority has been cited for that proposition, and I am of opinion that such a construction of the shipper's obligations would be altogether unreasonable. I do not for a moment deny that he is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is reasonably possible; and it may be that in certain circumstances, owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain an earlier berthing than would otherwise have been obtained. All that, I say, may be the case; but no such facts are found in the present case; and the appeal can only be decided in favour of the appellant by holding that at all ports and under all circumstances, however remote and improbable might be the contingency, the duty lay upon the charterer to have cargo there. That is a proposition to which I am unable to give my assent. For these reasons I agree in thinking that the appeal must be dismissed.

LORD MACNAGHTEN. I agree.

LORD MORRIS. I concur.

Ordered that the appeal be dismissed with costs.

Lords' Journals, March 19, 1896.

Solicitors for appellant: *Lowless & Co.*

Solicitors for respondents: *Wilson & Son, for Boyd, Jameson & Kelly, W.S., Leith.*

[HOUSE OF LORDS.]

H. L. (Sc.) OGSTON . . . . . APPELLANT;

1896

March 26. AND

STEWART . . . . . RESPONDENT.

Salmon Fishings—Boundary—Fishings ex adverso Glebe Land.

Where in a pending cause it appears that the Crown has a primâ facie claim to the salmon fishings in dispute, the Court ought to direct intimation to be made to the Crown authorities; and stay the action pending their decision to appear or bring a separate action.

The pursuer's lands of Ardoe and the defender's lands of Banchory marched inland, and were both bounded by the River Dee. But at the river there was interjected between these two estates the glebe of Banchory-Devenick, which extended along the river front 350 yards. The minister had no title to the salmon fishings. The titles of Ardoe and Banchory included the salmon fishings "belonging to" the lands; but these titles contained no express grant to the fishings ex adverso the glebe. The pursuer admitted that the defender had an exclusive right to the fishings eastward from a drain leading to the river from the offices of the manse, but he claimed the exclusive right from the east march of Ardoe up to the same drain, a space of 135 yards. The defender maintained that the fishings in question belonged to him, as being ex adverso of his lands of Kirkton of Banchory:—

Held, reversing the decision of the First Division of the Court of Session, that it was a matter of reasonable inference from the proof that the glebe included no part of the lands of Kirkton, but did include portions of Banchory and Ardoe, and that the disputed fishings remained with Ardoe.

APPEAL from the First Division of the Court of Session, Scotland (1), in an action of declarator of right to salmon fishing raised by the appellant Alexander M. Ogston, proprietor of the estate of Ardoe, against the respondent David Stewart, and James Walker, now deceased, as trustees of John Stewart, late proprietor of the estate of Banchory in the parish of Banchory-Devenick, county of Kincardine; and against David Stewart as an individual.

The action had reference to the right of the appellant to fish for salmon in the River Dee ex adverso of his estate of Ardoe, and also ex adverso of that portion of the glebe lands of the

(1) 21 Court Sess. Cas. 4th Series (Rettie), 282.

parish of Banchory-Devenick extending up to a point where a drain leading from the manse offices through the glebe lands entered the river. The respondent claimed, substantially, that the proprietor of Banchory had right to the whole fishings ex adverso of the glebe, including the disputed portion, or alternatively that the portion in question belonged to the parties jointly. The Lord Ordinary (Moncreiff) on February 8, 1893, found in favour of the appellant. On a reclaiming note to the First Division, and after debate, the respondent was allowed, on July 6, 1893, to amend the record by adding a plea in law to the effect that the appellant had no title or right to the salmon fishings in question. On November 28, 1893, their Lordships recalled the Lord Ordinary's interlocutor; sustained the additional plea in law added for the respondent, and assoilzied the respondent from the conclusions of the action.

The lands of Ardoe, the glebe lands, and the lands of Banchory are all bounded on the north by the River Dee: the lands of Ardoe lying to the west, those of Banchory to the east, and the glebe lands intervening. The glebe extends along the river for about 350 yards; and the incumbent has admittedly no title to the fishing. The estate of Banchory now includes two separate properties known as Banchory-Devenick and Kirktown, or Kirkton, of Banchory, but these estates have been for a long time united. All these estates were once church lands. The contention of the appellant was that the glebe was originally designated out of both Ardoe and Banchory, and that Kirkton of Banchory had no Crown grant of salmon fishings attached to it. The First Division held that unless it were proved that the salmon fishings in dispute were not ex adverso the lands of Kirkton of Banchory, the presumption was that the right remained in the Crown.

Evidence was adduced before the Lord Ordinary, the material parts of which are stated in the judgment of Lord Watson.

1895. Dec. 13, 17; 1896. Feb. 13, 14. *The Solicitor-General for Scotland* (*A. Graham Murray, Q.C.*), and *Haldane, Q.C.*, (with them *D. M. Abel*, of the Scottish Bar), for the appellant. The march between the fishings of Ardoe and Banchory is the

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drain. The strip of fishings ex adverso the glebe lies between these two properties; it is therefore probable that the glebe was originally cut out of these two estates. The 135 yards of fishings in question are of no great value, and can only be fished with rod and line. The titles are, therefore, to be interpreted by such possession as the subject is capable of. The most thorough mode of possessing salmon fishings is by net and coble. Where that mode is impracticable then fishing with rod and line will be sufficient to constitute legal possession.

[LORD SHAND. Why was the Crown not cited?]

The evidence of possession shews that, with the universal consent of all persons concerned, the drain was the march between the fishings. The leases on both sides support that view, and from the date that rod-fishing is proved there is distinct possession on the part of the appellant; indeed his general evidence goes back to 1806. If anything more were needed it was supplied by the letters of the respondent of July 16 and 18, 1889, written to the appellant, wherein, refusing friendly arbitration, he states that the boundary is the drain leading from the manse offices.

As to the designation of the glebe. There is nothing to justify the assumption that any part of the glebe was designated out of Kirkton of Banchory. Its shape, situation, and general contour, and the proved boundary of the Banchory fishings, all shew that it was designated partly out of Ardoe and partly out of Banchory. It is not proved that at the date of the designation (1602) Kirkton was the only and nearest church land not feued out. The Scottish Acts dealing with the designation of glebes were: the Act of 1563, c. 72, which prohibited parsons and vicars and other churchmen setting in feu their manses or glebes, provided also that so much land be annexed to the dwelling-house of them that minister to the kirk which good advisers approve. The Act of 1572, c. 48, declared that the manses, whether belonging to the parson or vicar, next to the church and most commodious, should belong to the minister or reader serving thereat, together with four acres of land of the glebe most convenient to the said manse if there be so much, and failing thereof so much as designated at the next visita-

tion. The Act of 1592, c. 118, extended these provisions to the case of cathedral and abbey churches. The Act of 1593, c. 165, ordained that the designation of the glebe should be made of the parson, vicar, abbot, or prior's land, and, failing thereof, out of the bishop's land or any other kirk lands within the parish, until the four acres were complete: Duncan's Par. and Eccl. Law, 2nd ed. p. 474. The meeting of the presbytery was on March 20, 1602, to designate the glebe, but, unfortunately, the two pages of the presbytery volume, following the words "Designatione of ye glieb," are blank. The first charter of Ardoe extant is that of 1502 shewing that it belonged to the monastery of Arbroath, and had been feued out with the salmon fishings in two parcels known as the "Sunny" and "Shadowy" half, each carrying a right to salmon fishing. These two parcels again became united in 1597. In 1594 James VI. granted to Cheyne a Crown charter of the "Sunny" half, "Unacum salmonū piscaria in aqua de die dictis terris adjeceñ." In 1596 a charter of the "Shadowy" half with the fishing was granted by James VI. to Mercer and Blinschell his spouse. Banchory also came from the abbots of Arbroath. The Kirkton of Banchory was given out in feu by the Bishop of Aberdeen in 1571, but it is not until 1744 that any mention is made in a title of Kirkton of Banchory of salmon fishing. The recital is "Together siclike with the whole salmond fishing on the water of Dee belonging to the said whole lands." The appellant contends that Kirkton of Banchory never had salmon fishing and was never riparian. On the whole of this evidence it cannot be doubted that the glebe was taken out of both Ardoe and Banchory; that the drain was the march dividing them; and that the fishing in question belongs to the appellant.

[They cited as to possession Lord O'Hagan in *Lord Advocate* v. *Lord Lovat* (1); and that a grant may be explained to comprehend something more than the fishing ex adverso: *Fraser* v. *Grant* (2) and *Earl of Zetland* v. *Tennent's Trustees*. (3)]

The Dean of Faculty (*Asher, Q.C.*) and *Dundas* (of the Scottish Bar), for the respondent. The appellant has not shewn such a

(1) 5 App. Cas. 288. (2) 4 Court Sess. Cas. 3rd Series (Macpherson), 596.
(3) 11 Court Sess. Cas. 3rd Series (Macpherson), 469.

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title as gives him the right claimed. His title consists of two grants of the "Sunny" and "Shadowy" halves of the lands of Ardoe; and a later title unites these estates with salmon fishing belonging to the said lands. A title of that sort is primâ facie a title to fishings contiguous to the lands: Lord Cairns in *Stuart* v. *M'Barnet* (1), and Lord Herschell L.C. in *Warrand's Trustees* v. *Mackintosh*. (2) But there is no doubt it is not conclusive. The appellant puts his case on prescriptive possession, and suggests that part of the glebe lands have been designated out of Ardoe, which fact, plus the possession, gives him the right. The Court of Session decided that it was a Crown fishing; and since then the Crown have advertised the fishing to let. The respondent's contention is that the Crown gave out the lands of Kirkton and retained the fishing as of no value. There is no doubt that the fishings would pass by twenty years' possession under the Conveyancing and Land Transfer Act of 1874 (37 & 38 Vict. c. 94), s. 34.

As to possession, the sale to Gillan of a portion of Ardoe as the land of Cotbank lying immediately to the west of the glebe in 1853 shews the proprietor of Ardoe did not then consider this fishing was his, for he conveyed only the salmon fishing in the Dee to a point marked on the plan annexed to the disposition, which point formed the eastern boundary of Cotbank, and did not include the further point now claimed to the drain. In any view it shews the fishing was not possessed from 1853 to 1873, the date of the repurchase of Cotbank by Ardoe; and the present action being raised in 1892 the possession is short of the necessary twenty years' possession. Then the Ardoe lease of 1840 was limited to Ardoe proper, and it is only in 1878 that there is a lease extending to the manse. In fact from 1833 to 1878 these fishings were not claimed. Nothing can be founded on the letters of the respondent now that proof has been led; but it may be explained, that they were written by a person having very imperfect knowledge, misled by Clark's lease and Mackie's, the ground officer's, statement, and meeting a much larger claim then put forward by the appellant.

As to the glebe forming part of Ardoe and Banchory, the

(1) L. R. 1 H. L. Sc. 387. (2) 15 App. Cas. 52.

presumption is irresistible that it was formerly part of Kirkton of Banchory. It belonged to the Bishop of Aberdeen. Banchory and Ardoe were also church lands but feued out much earlier. Now the Act of 1592, c. 118, extended the scope and range of the previous Acts by providing that glebes might be allocated out of lands owned by the bishop: Duncan's Par. Eccl. Law (2nd ed.), 476, 477. The vicar of Banchory-Devenick was a prebend of the cathedral church of Aberdeen: 2 Registrum Episcopatus Aberdonensis (Spalding Club), p. 40. The presbytery were designating what had been part of the glebe prior to the Reformation, and there was at the date of the Reformation a right to the land which surrounded the church of Banchory and Kirkton, and this would be the land within the Act of 1592 primary to be designated. The respondent's point is that the glebe was to be designated out of lands which during pre-Reformation times were round the church. Kirkton was such land. Then the decreet arbitral of 1621 between Ardoe and Banchory in regard to "Charmeris Haugh" shewed that Kirkton extended to the river, and the western boundary of the glebe being in Kirkton, it follows the glebe was in Kirkton. The respondent is here on the defensive, but his counter evidence is an answer to the appellant's action.

[They also cited *Nicholson* v. *Porteous* (1); *Nairn* v. *Boswall* (2); and *Parson of Dysart* v. *Watson.* (3)]

The Solicitor-General for Scotland, in reply, cited *Mackintosh* v. *Abinger.* (4)

LORD WATSON. The appellant is proprietor of the lands of Ardoe, whilst the respondent is proprietor of the lands of Banchory and others, both estates being in the parish of Banchory-Devenick and county of Kincardine, and bounded on the north by the River Dee. The parochial glebe of Banchory-Devenick, which also has the river for its northern boundary, is situated between these properties, marching, at the river-side, with Ardoe on the west, and with Banchory on the east.

(1) Mor. Dict. 5136.
(2) Mor. Dict. 5137.
(3) Mor. Dict. 5139.
(4) 4 Court Sess. Cas. 4th Series (Rettie), 1069.

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In this action the appellant concludes for declarator that he has the exclusive right of fishing for salmon ex adverso of the westmost portion of the glebe lands between the march with Ardoe and a drain which leads from the manse offices to the river. The claim thus asserted relates to a stretch of water about 135 yards in length, which, according to the evidence, is incapable of being profitably fished with the net, and is of little value for angling purposes.

It is not matter of dispute in this case, that the salmon fishings of the glebe lands, to the east of these 135 yards, belong to and have been possessed from time immemorial by the respondent and his predecessors in title, along with the fishings to the east of the glebe. Each of the parties avers that the fishings in dispute are within the ambit of his title from the Crown; and also that he has had continuous and exclusive possession during and beyond the period of prescription, which, in the case of rights such as that of salmon fishing, has been reduced from forty to twenty years by s. 34 of the Conveyancing and Land Transfer Act of 1874 (37 & 38 Vict. c. 94). On record, the respondent maintains alternatively that he has a joint right to the fishings with the appellant. Accordingly, the only issue raised by the pleadings is whether the fishings in dispute belong to the appellant or to the respondent, or to both of them. Upon that footing a proof was allowed, and was led before the Lord Ordinary (Moncreiff), who gave judgment for the appellant.

When the case was heard before the First Division the respondent was allowed to add a plea to the effect that the appellant "has no title or right to the salmon fishings in question," which was sustained by the Court upon the ground that the appellant had not established such an amount of possession as would be sufficient, in a question with the Crown, either to sustain a prescriptive right, or to shew that the fishings were within his title. The learned judges therefore recalled the interlocutor of the Lord Ordinary, assoilzied the respondent, and found the appellant liable in expenses. In the view which they took, it appears to me that the course which their Lordships ought to have followed was, not to grant

absolvitor, but to direct intimation to be made to the Crown authorities, so as to give them an opportunity of appearing in this process, or of bringing a separate action, the present suit being stayed, in order to await the result of these proceedings. It might have been more satisfactory if that course had been adopted; but, after hearing the argument upon this appeal, I can find no reason why your Lordships should not dispose of it upon its merits, and put an end to this litigation. The question presented for decision upon the record and evidence is, substantially, one of boundary between two neighbouring proprietors; and, in my opinion, there are no elements in the proof which naturally or necessarily suggest that the Crown has a primâ facie claim to the fishings in question. If the Crown should have a well-founded claim, it cannot be prejudiced by a decision between the parties to this appeal.

Before referring to the evidence I shall notice the titles under which the parties respectively contend that they have an express grant of the fishings in question from the Crown.

The estate of Ardoe, as now vested in the appellant, was originally the property of the church. It belonged to the abbot and convent of Arbroath, by whom it was disponed in feu to laymen, about the end of the fifteenth century, in two separate parcels, described as the "Sunny" and "Shadowy" halves. In both cases the disposition was with the salmon fishings in the Dee adjacent to the half conveyed; and that right has all along been recognised by the Crown, and continued in the subsequent progress of the appellant's titles.

The respondent's estate of Banchory is made up of two parcels, which have been held by the same proprietor since the year 1618, but anciently belonged to two different ecclesiastical bodies. The lands and barony of Banchory, with their salmon fishings in the river of Dee, were, in the thirteenth century, feued out by the abbot and convent of Arbroath to the justiciar of Scotland, and have since been held by laymen. The Kirkton of Banchory belonged to the see of Old Machar until 1571, when it was feued by the bishop, with the consent of the dean and chapter. It was acquired by Alexander Gardyne of Banchory in the year 1618. Down to that date the Kirkton titles contained no grant

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of salmon fishing. In November, 1743, a successor of Alexander Gardyne, by the same deed, disponed the lands and barony of Banchory and also the Kirkton to Alexander Thomson, "with the whole salmond fishing in the water of Dee belonging to the said whole lands"; and in May, 1744, the disponee, under the procuratory contained in that disposition, expede a Crown charter of resignation, in which these lands are granted "cum integra salmonum piscatione super aquam de Dee ad dictas terras spectante."

The proof led by the parties, which I do not think it necessary to examine in detail, is chiefly directed to two matters, the first of these being the extent of possession of the disputed fishings which has been exercised by the parties respectively within and beyond the years of prescription; and the second, the point which has been reputed to be, and has been recognised as, the boundary between their fishings.

The evidence of possession, as might well have been anticipated in a case of this kind, cannot with propriety be described as full and satisfactory. But, having regard to the barren nature of the subject which forms the stake in this action, the possession of the appellant and his predecessors, and others in their right, exercised by rod and line, which was the only suitable method, appears to me to have been as extensive as might have been expected of a single proprietor who had a clear title from the Crown. There is no doubt a certain degree of complication arising from the fact that there is evidence of persons from the Banchory estate having angled in the disputed water. When, however, the evidence as to the boundary observed during the time when these incursions were made is taken into account, as in my opinion it ought to be, I cannot regard them as acts intentionally adverse to, and, therefore, as neutralising the effect of the possession proved by the appellant.

The evidence, in so far as it bears upon the second point, the question of fishing boundary, appears to me, as it did to the Lord Ordinary, to be in favour of the appellant. In arriving at that conclusion, I do not rely upon the respondent's admission, in a letter of July 16, 1889, to the effect that the fishing boundary now claimed by the appellant "had never been

disputed by any one." The respondent has retracted that admission, and has explained in his testimony that the letter was written under a misapprehension, upon information received by him from one Mackie, now in America, who was at that time, and had for many years previously been ground officer on the estate of Banchory. It is, however, impossible to discard the fact that the information was given to him by his own servant, who presumably had the best means of knowing the truth; and Mackie's information is, in my opinion, corroborated by the proof. In November, 1850, the whole of the Banchory salmon fishings, including those ex adverso of the glebe, were offered on lease, and were taken by Robert Clark for three seasons, commencing on February 1, 1851. The conditions of let prepared by the proprietor and accepted by the tenant state that "the western boundary is at the manse offices." Clark from time to time renewed his tenancy upon the same terms, until he obtained a lease for nineteen years from Martinmas, 1868, of a farm upon the estate of Banchory, "along with the salmon fishing on the Dee presently occupied by him." Clark was examined as a witness, and stated that during his occupation under these leases, covering a period of thirty-seven years, "he never tried to fish farther west than the manse offices of Banchory-Devenick." In the face of that evidence, which is practically uncontradicted, I am unable to regard an occasional cast in the disputed water, by persons coming from the estate of Banchory, as an assertion of their right to it by the proprietors of that estate.

Assuming the appellant to have made out his case, in so far as concerns possession by rod-fishing and the recognised boundary between his fishings and those of the respondent, these facts will not avail him unless he is able to shew that his possession, or right of fishing, can be reasonably ascribed to his title as proprietor of Ardoe. The respondent alleges, on record, that the glebe was designed "out of the church lands of the Kirkton of Banchory," and consequently that, after its designation, "the right to the salmon fishings ex adverso of the glebe remained in the proprietors of Banchory"; and, if these statements were substantiated, the appellant would not be in a

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position to ask decree in terms of his summons. There is no direct evidence in support of the allegation that the glebe was designed out of the lands of the Kirkton; it rests upon mere conjecture; and, in my opinion, there are various considerations which strongly point to a different conclusion.

It appears from the minute-book of the presbytery of Aberdeen that the glebe was designated by them in March, 1602. The difficulties which beset this part of the case have arisen from the fact that the presbytery clerk, though he left a blank space for the purpose, has omitted to enter the formal act of designation, which, if it had been extant, would have shewn the particular lands which were taken from their owners, or given up by them, in order to constitute the glebe of the parish. There seems no reason to doubt that the glebe as then designated, with the exception of some immaterial alterations of boundary which were made about the year 1837, has ever since been possessed by Mr. Robert Mercer, the incumbent of 1602, and his successors in the benefice. The parsonage of Banchory-Devenick was anciently held by a prebend of Old Machar, who had his residence in Aberdeen; the cure being served by a vicar, who, in all likelihood, had a residence at Banchory-Devenick. It is, however, obvious that, in 1602, the minister's demand for a glebe, and the lands assigned to him, included a much larger area than had previously been occupied by the vicar.

The statutes from which, in the year 1602, the authority of presbyteries to allocate glebes for the reformed clergy was derived were 1563, c. 72; 1572, c. 48; 1592, c. 118, and 1593, c. 165. By these Acts the powers of the presbytery had been gradually increased; but they did not, as yet, extend beyond church lands, i.e., lands which either were, or had at one time been, the property of the church. The Act of 1593 (Thomson's Acts, vol. 4, p. 17) provided that, in cases where there was no glebe, or where the old glebe was less than four acres, the designation was to be made "of the parson, vicar, abbot, or prior's lands, and failing thereof out of the bishop's lands, friar's lands, or any other kirk land lying within the bounds of the said parish."

Banchory, Kirkton of Banchory, and Ardoe, were all of them church lands within the meaning of these Acts; but there was this material difference between them. Banchory and Ardoe were abbot's lands, having originally belonged to the abbot and convent of Arbroath; whereas the lands of Kirkton were bishop's lands, and therefore not liable to be designated as glebe until Banchory and Ardoe had been exhausted. I have failed to discover, and the respondent did not suggest, any reason why the presbytery, in assigning a glebe to the minister of Banchory-Devenick, should have entirely disregarded the order of designation prescribed by the Act of 1593. The Kirkton of Banchory was not acquired by the proprietor of Banchory until 1618; and it cannot be presumed that its then owner consented to part of it being designated in 1602, in order to protect Banchory and Ardoe from designation.

There are other considerations which, to my mind, enhance the improbability of any part of the Kirkton of Banchory having been included in the designation of 1602. There is nothing to shew that any of the lands of Kirkton were riparian. The terms of the Crown Charter of 1744 do not appear to me necessarily to indicate that they were so. It was not a charter containing any fresh grant, but was merely a renewal of the rights already held by the predecessors of the grantee in and connected with the lands of Banchory and Kirkton, the latter having admittedly no right of salmon fishing attached to them. It was revised and passed by the Scottish Court of Exchequer, as then constituted under 6 Anne, c. 26, who had no power to add to the rights previously granted out by the Crown. According to Mr. Erskine (Inst. I. 3, 32), "When the signature contains no more than was contained in the vassal's former charter, the barons may pass it; but when it imports a conveyance of any new subject not formerly granted by the Crown, it must be first superscribed by the King himself; for if it pass of course in exchequer, it is not effectual to the grantee, in so far as relates to such new right." If, therefore, part of Kirkton was riparian, the grant of its salmon fishings was ultra vires of the Court, and could not bind the Crown. If not, the charter did nothing more than continue the former investitures. I do not

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think it ought to be assumed that the Court of Exchequer either neglected its duty or exceeded its powers.

In these circumstances, I am of opinion that it is matter of reasonable inference from the title deeds of the litigants, and from the facts disclosed in the proof, that the glebe of Banchory-Devenick as designated did not include any part of Kirkton, and that it did include portions both of Banchory and Ardoe. It being beyond the power of the presbytery to assign salmon fishings to the minister, the disputed fishings would, in that case, remain with Ardoe, and the other fishings of the glebe with Banchory.

I would, therefore, advise your Lordships to reverse the judgment appealed from; to restore the Lord Ordinary's interlocutor of February 8, 1893, and to declare that the respondent must pay to the appellant the expenses incurred by him in the Court of Session after the date of that interlocutor, and also his cost of this appeal.

I have been requested by Lord Shand, who is unable to be present to-day, to state that he has examined and concurs in the opinion which I have expressed.

LORD HALSBURY L.C. I concur in the judgment which has been moved by my noble and learned friend, and with the grounds on which he has rested it.

LORD MACNAGHTEN. I have had an opportunity of reading the opinion of my noble and learned friend opposite (Lord Watson), and I entirely concur in it.

LORD DAVEY. I also have had an opportunity of reading the judgment which has just been delivered, and entirely concur in it.

Interlocutor appealed from reversed and the interlocutor of the Lord Ordinary of February 8, 1893, *restored. The respondent to pay the appellant the expenses incurred by him in the Court of Session since the date of the Lord*

Ordinary's interlocutor, and also the appellant's costs of the appeal.

Lords' Journals, March 26, 1896.

Agents for appellant: *Grahames, Currey & Spens, for C. & P. H. Chalmers, Advocates, Aberdeen, and Auld & Macdonald, W.S., Edinburgh.*

Agents for respondent: *A. & W. Beveridge, for Lumsden & Davidson, Advocates, Aberdeen, and T. J. Gordon & Falconer, W.S., Edinburgh.*

[HOUSE OF LORDS.]

GRIFFIN'S DIVORCE BILL.

Divorce Bill—Substituted Service—Deceased Witness—Judge's Note of Evidence—Admissibility.

A certified copy of the judge's notes of the evidence of a witness called by the petitioner at the hearing of a petition for divorce a mensâ et thoro cannot, in case of the death of the witness, be received as proof of the matters deposed to by him upon the second reading of a bill for divorce presented by the petitioner.

BILL to dissolve the marriage between Richard Hollingsworth Griffin, of Dublin, mechanical engineer, and the respondent Annie B. Griffin, his now wife, on the ground of her adultery.

The marriage was celebrated on August 15, 1876. Two children of the marriage were living, the youngest aged thirteen.

On November 16, 1885, the respondent left her home ostensibly on a visit; but the petitioner shortly afterwards discovered that she and one George Linton Earle had passed the night of November 17 at Moore's Hotel, Queenstown, and had sailed the next day for America. The respondent at the date of the petition resided at 1106, Jefferson Avenue, Brooklyn, New York, under the name of Mrs. Earle. Shortly after her flight she wrote a letter to the petitioner asking for forgiveness; but by the same post one was received from her addressed to

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the petitioner's servant, in which she practically admitted her guilt.

On June 1, 1886, the petitioner obtained in the Probate and Matrimonial Division, Dublin, a final decree of divorce a mensâ et thoro.

In 1888 the petitioner instructed his solicitor to introduce a bill in Parliament to dissolve the marriage; but, having only a salary of about 140*l.*, he could not proceed further owing to the expense.

On May 1, 1895, the petitioner brought an action in Ireland against Earle for criminal conversation, and the writ was served on Earle personally at 1106, Jefferson Avenue, Brooklyn, New York. Damages of 500*l.* were awarded against Earle in his absence, but nothing had been obtained.

SUBSTITUTED SERVICE.

March 3. *Henry C. Gollan* applied to the House that notice of the second reading of the bill might be allowed to be served on A. R. O. Lowndes, the solicitor of the respondent. A. R. O. Lowndes stated that he had been instructed by letter from the respondent in New York to appear in the proposed proceedings of 1888. In 1895 he had been in communication with her, and he produced a letter from her asking him to forward the documents connected with the bill. He had never seen the respondent. The letter was proved to be in the handwriting of the respondent.

THE HOUSE (Lord Halsbury L.C., and Lords Herschell, Macnaghten, and Morris) made the required order.

SECOND READING.

March 17. *James Roberts*, for the petitioner, stated the facts as given above. Having called the petitioner and other witnesses, he produced the death certificate of Patrick Fitzgerald, the late proprietor of Moore's Hotel, Queenstown, who at the hearing of the petition in Dublin in 1886 gave evidence proving the guilt of the respondent. Counsel then proposed to

read Fitzgerald's evidence taken from the certified copy of the judge's notes (1), citing *Llewelyn's Divorce Bill*, 1851. (2)

[LORD HALSBURY L.C. It is quite true that the standing orders require that an official copy of the proceedings in the Court below should be laid on the table of the House; but that does not supply the place of evidence, where evidence is necessary. The judge's notes, though very important, do not prove themselves. I am not aware of any Act of Parliament which makes a certified copy of the judge's notes evidence; it may be immaterial in this case, but it would be a rather bad precedent to admit them without more. Have you an affidavit that this evidence was given?]

Roberts. The petitioner's Dublin agent is now present, and he was in Court when the evidence in question was given.

[LORD HALSBURY L.C. That will do.]

W. J. Brett deposed that he had the conduct of the petitioner's action in Dublin. The deceased, Patrick Fitzgerald, was called as a witness; he remembered the effect of that evidence; the extract from the judge's notes was a correct account of the evidence he heard the deceased give. He was present when the judge's notes were signed and sealed by the officer of the Court.

The judge's notes of the evidence were then read.

THE HOUSE (Lord Halsbury L.C., and Lords Watson, Herschell, Macnaghten, Morris, Shand and Davey—there being also present the Bishop of Manchester) passed the preamble of the bill.

Agents for petitioner: *Mills, Lockyer & Mills, for William J. Brett, Dublin.*

(1) It appeared that as there were no official shorthand notes of the trial a certified copy of the judge's notes were obtained and delivered in.

(2) *The Times*, July 16, 1851; 83 H. L. Jour. 373. See Macq. H. L. 577; and Taylor's Evidence, 9th ed. s. 546.

[HOUSE OF LORDS.]

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ROBERT MURRAY BURGESS . . . . APPELLANT;

AND

ANDREW MORTON . . . . . RESPONDENT.

Practice—Procedure—Special Case—Proceedings extra Cursum Curiæ—Appeal—Jurisdiction—Rules of the Supreme Court—Order XXXIV. *r.* 1.

Where a special case is calculated and intended to raise for decision questions of fact only, the proceedings are extra cursum curiæ, the judgment of the Court is in the nature of an arbitrator's award, and an appeal cannot be entertained if its competency is objected to by the party holding the judgment. If in these circumstances the Court of Appeal reverses the judgment below, this House has no jurisdiction except to reverse as incompetent the judgment of the Court of Appeal.

APPEAL from an order of the Court of Appeal reversing an order of the Queen's Bench Division in the circumstances stated in the judgment of Lord Watson.

Nov. 18, 19. *Forbes, Q.C.*, and *George Banks*, for appellant. *Cohen, Q.C.*, and *Scott Fox*, for respondent.

The House took time for consideration.

Dec. 16. LORD HALSBURY L.C. My Lords, in this case an effort has been made to try in the form of a special case a pure question of fact, and to make it subject to the ordinary consequences of an appeal, first to the Court of Appeal, and then to this House.

Speaking for myself, my Lords, I will not be a party to such a course of procedure. It is objectionable in two ways: it is objectionable as asking your Lordships to try a question of fact without the facts themselves being put before you. It is objectionable as a question of procedure because the Legislature has provided a mode of deciding questions of law when the parties are practically agreed upon the facts; but this is an effort to make use of that convenient method of trying a question of law by agreeing to what is called a special case,

but which by arrangement between the parties does not state either the inferences of fact or even all the facts from which inferences are to be drawn.

It has been candidly admitted by counsel at the Bar how this has occurred. The parties could not agree on the facts—in particular as to what passed at the conversation between the parties—which conversation, terminating in an agreement, would have been decisive one way or the other upon the question which your Lordships are asked to determine now. Because the parties could not agree, and there was no person who could decide between them how the fact was, they agreed to a special case in which this matter is left out altogether—the intentional omission including the disputed parts of the conversation as to an agreement—and asked first the Court below, and now your Lordships to grope in the dark as best you can to find out what was the real effect of the agreement between the parties which the parties themselves have deliberately withheld because they could not agree upon the evidence of what passed between them. My Lords, I think that is a complete perversion of the procedure provided by the rules.

When the case came before the Divisional Court it was immediately observed by the judges that this was not properly a special case, and neither by counsel nor judges was it treated as being left to the judges as a special case raising a question of law; but upon the invitation of counsel the learned judges agreed to hear it and decide it as a question of fact. After the judgment was given both the learned judges, upon an application to stay, interposed with the observation that it having been left to them to decide as a question of fact they could not see how there could be any appeal. Both judges were agreed that there was no point of law, and, indeed, that has not been disputed before your Lordships. I am therefore of opinion that there is no appeal. The learned judges were invited to sit practically as arbitrators, and their decision upon the only question in dispute, namely, the question of fact, I regard as final.

In saying this, I have not omitted to observe that the special case in terms allows the Court to draw inferences of fact; that

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is a very well understood provision. Occasionally it will happen that upon the facts as agreed some point is left uncovered, and in order to prevent the necessity of going back to the arbitrator or tribunal of fact, that provision is inserted to enable the Court, upon the question of law raised, to draw such inferences of fact as may not be specifically found. But the objection here is that no question of law was raised or intended to be raised, but a question of fact only, which the Divisional Court only heard upon the understanding that they were arbitrating between the parties.

My Lords, it has been held in this House that where with the acquiescence of both parties a judge departs from the ordinary course of procedure and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding and to treat the matter as if it had been heard in due course.

I am satisfied that if the parties had not agreed to take the decision of the Divisional Court upon the question of fact that Court would have refused to hear the case. The parties having done so, I think they are now precluded from treating the matter as subject to appeal, and I think, therefore, that this appeal must succeed upon the ground that the Court of Appeal had no jurisdiction to entertain the question.

For these reasons it becomes unnecessary to consider what would have been the proper decision, and I accordingly move your Lordships that the judgment of the Court of Appeal be reversed, and the original judgment of the Divisional Court restored, the respondent to pay to the appellant the costs both here and below.

LORD WATSON. My Lords, before dealing with the points which require to be considered in this appeal, it is necessary to notice the circumstances giving rise to the action, and also the peculiar course of procedure which it has taken.

On September 30, 1891, the firm of Bean & Gough, consisting of two partners, was dissolved by mutual consent upon the terms that Gough should continue the business, and should, in consideration of his being permitted to take over the bulk of

its assets, relieve the retiring partner of the whole liabilities of the firm. Some time (it does not appear how long) before the date of the dissolution the respondent had a meeting with the two partners, at which he consented, in the event of its taking place, to assist Gough towards carrying on the business. He accordingly continued to deal with Gough, who traded under the name of C. H. Gough & Co., until the concern became bankrupt in July 1892. At the time of its dissolution the old firm was owing a considerable sum to the respondent.

The appellant, who is trustee in the bankruptcy of C. H. Gough & Co., in December 1892 brought this action against the respondent for recovery of 1067*l.* 10*s.* 10*d.*, as the balance due on his transactions with the bankrupt. The respondent resisted decree, mainly on the ground that he was entitled to set off against that balance the sum due to him by the old firm. The cause was set down for trial at York before the late Lord Chief Justice, when, there being no likelihood of its being reached, the parties, with the consent of the learned judge, agreed to withdraw it from trial, and to state a special case for the decision of the Court.

In the special case the only matter which is professedly submitted for adjudication is the respondent's contention to the effect that "he is entitled to set off the moneys owing to him from the said firm of Bean & Gough, at the date of the said dissolution of partnership, against the sum claimed on the writ." The case accordingly concludes by stating the agreement of parties that, in the event of his contention being sustained, judgment should be entered for the respondent, with costs, and that it should be declared that he was entitled to prove against the bankrupt estate for 62*l.*; and that, in the event of its being rejected, judgment should be entered for the appellant for the sum of 836*l.* 11*s.* with costs.

The facts and circumstances detailed in the case are not calculated, and were not intended, to raise directly any question of law. In the Courts below, and at your Lordships' Bar, neither party attempted to conceal that the facts necessary in order to raise the law are not ascertained. They admitted that their primary if not their only object was to obtain a decision

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upon a question of fact, that question being, whether the statements in the case do or do not warrant the inference that the respondent had, before the bankruptcy of Gough, made an agreement which would entitle him to a set-off.

The case was first submitted to a Divisional Court, composed of Wills and Wright JJ., who pointed out the incompetency and inexpediency of trying such a question by means of a special case, but expressed their willingness to do the best they could to decide it, if the parties desired them to do so. On that footing the learned judges heard the case, and gave judgment for the present appellant, upon the ground that the facts and circumstances stated were insufficient to warrant an inference that the respondent had made any agreement which could support his plea of compensation.

That decision was brought by the respondent under the review of the Court of Appeal, who reversed it and gave judgment in his favour. The Master of the Rolls, with Lopes and Davey L.JJ., held it to be a matter of reasonable inference that, at his meeting with the partners before September 30, 1891, the respondent had, in fact, agreed, in the event of a dissolution taking place, to discharge Bean and to accept Gough as his sole debtor. The opinions delivered by the learned judges deal exclusively with that question of fact, upon which alone their decision was based. But the present appellant objected to the competency of their interfering with the judgment of the Divisional Court, which he maintained to be conclusive. The objection was, however, overruled. The Master of the Rolls, after adverting to the terms of the special case, said: "Whether it is necessary in those circumstances that a question of law should be raised, is a matter which it seems to me it is not necessary to decide in this case, because I cannot have a doubt but that there were some difficult questions of law raised in this case, as well as inferences of fact which were to be drawn, so that it is a special case under the ordinary circumstances of a special case, with power for the Court to draw inferences of fact."

I am unable to assent to the view thus stated by Lord Esher. It does not appear to me to admit of doubt that the judgment

of the Divisional Court was substantially a consent order. I am also satisfied that the whole proceedings in the cause, from and after the time when the parties thought fit to retire from the proper tribunal for its trial, have been extra cursum curiæ. The rules which govern procedure on the common law side of the High Court of Justice do not contemplate or permit the use of a special case except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted; and the consent of a judge to its use for the purpose of trying a question of fact cannot, although the fact when found might give rise to legal questions, make it a regular proceeding in the ordinary course of law. I think the consent of the judge in this case must be presumed to have been given on the assumption that the parties meant to raise directly some question of law, although it now appears that they entertained no such intention.

There are several decisions of this House, in cases coming from Scotland, which appear to me to affirm that the judgment of a court below, pronounced extra cursum curiæ, is in the nature of an arbiter's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held, on that ground, to be incompetent in *Craig* v. *Duffus* (1); *Dudgeon* v. *Thomson* (2) and *Magistrates of Renfrew* v. *Hoby*. (3) All of these cases had the following features in common: (1.) The action had been remitted to the jury court by an interlocutor which was not subject to review; (2.) the parties had agreed, either before the trial commenced, or before the jury were asked to consider their verdict, to withdraw the action from jury trial, and to accept the decision of the Court, in one instance, upon a proof to be taken by commission, and in the others, upon the notes of the presiding judge and the productions made before him; and (3.) the Court referred to was a division of the Court of Session, so that the appeal was against the first and only decision which had been given upon the evidence. I may add, that all of these cases involved questions of law arising upon the facts, when these were ascertained.

(1) 6 Bell's Ap. 308. (2) 1 Macq. 714.
(3) 2 Macq. 478.

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The subsequent decision of the House in *Bickett* v. *Morris* (1) does not trench upon the authority of these precedents, although it establishes an exception in cases where the party holding the original judgment has stated no objection to an appeal from it to an intermediate court. In that case the action was one of the causes specially appropriated for trial by jury under the provisions of the Scottish Judicature Act of 1825. Whilst it depended before the Lord Ordinary, and before the usual order was made, remitting it to the jury court, the parties agreed that it should be disposed of by the Court upon a proof by commission. The proof was taken and was reported to the Lord Ordinary, who, after hearing parties, assoilzied the defender. The pursuers then presented a reclaiming note, to the competency of which no objection was stated; and the second division recalled the interlocutor of the Lord Ordinary and gave judgment for the pursuers.

The defender brought an appeal to this House against the decision of the second division, and was met by a preliminary plea of incompetency. After hearing a full argument upon the point, the Lord Chancellor (Lord Chelmsford), Lord Cranworth, and Lord Westbury unanimously repelled the plea, heard the appeal upon its merits, and affirmed the judgment appealed from. The Lord Chancellor said, "By taking the step of appealing to the Inner House, the pursuers, in my opinion, have precluded themselves from objecting that the interlocutor pronounced in their favour is not subject to all the consequences of other interlocutors, and, therefore, appealable to this House." Lord Westbury observed, "Upon the question of competency, it must be understood that the decision of your Lordships proceeds upon its being personally incompetent to the respondents to raise that objection."

In my opinion, it necessarily follows from the rule laid down by the House in these cases, that the Court of Appeal were incompetent to entertain the respondent's appeal to them, unless the appellant unreservedly submitted the determination of the special case, upon its merits, to their jurisdiction. So far from acquiescing in, he objected to the jurisdiction of the

(1) L. R. 1 H. L., Sc. 47.

Appeal Court, and there can therefore be no reason for holding, as in *Bickett* v. *Morris* (1), that he is personally barred from now pleading the absolute finality of the judgment of the Divisional Court. In my opinion the House has, in these circumstances no jurisdiction except to reverse, as incompetent, the judgment of the Court of Appeal.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD SHAND. My Lords, the special case adjusted by the parties in this cause did not expressly state what was the question raised for the decision of the Court. Article 18 sets forth the defendant's contention that he is entitled, as against the claim of the plaintiff as trustee in bankruptcy of Charles Henry Gough for goods sold and delivered to the defendant by Gough trading under the firm of C. H. Gough & Co., to set off the debt mentioned in the case due to him by the company of Bean and Gough, of which Gough had been a partner. The grounds on which this contention is rested are explained in the other articles of the case. The defendant's contention depended entirely, as it seems to me, on a question of fact—the question, namely, whether at or after the dissolution of the firm of Bean and Gough, it had been arranged and agreed with reference to the dealings between himself and Gough that the defendant should accept of Gough, to whom the assets of the old firm were transferred, as his sole debtor in place of the old firm, or at least that Gough should personally become debtor to the defendant in the debt due to him by the company of Bean and Gough, with the result in either case that the defendant would have a right of compensation. If there was no such agreement in fact the defendant had no right of set off. If there was such an agreement there resulted a legal right to set off the debt due to him by the old firm against the debt claimed by Gough, or the plaintiff his trustee in bankruptcy, who had no higher right than was possessed by the bankrupt.

The true question to be determined was, therefore, agreement or no agreement to the effect maintained by the defendant; and

(1) L. R. 1 H. L., Sc. 47.

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this question as one of fact depended on the view which the Court should take of what occurred at an interview between the defendant and Gough mentioned in Article 5 of the case, and of the correspondence and conduct of the parties, particularly in the rendering of accounts and the making up of statements of accounts as fully set forth in the other Articles. The whole statements in the case relate entirely to the evidence bearing on the question of agreement or no agreement. That question of fact once determined the legal result necessarily followed. If the agreement was proved the right of set off followed. If the proof of agreement failed the plaintiff was entitled to decree in terms of his claim.

The learned counsel for the parties were unable to suggest any different view from that now stated. Where a question of law arises on facts agreed on, or on alternative views of the facts, the question admits of being distinctly stated, and it is usual and desirable that it should be so stated expressly. In the present instance not only does the special case state no such question, but counsel did not suggest that any such question admitted of being formulated. It is true that the case contains in Article 20 the clause usually inserted where questions of law are presented for decision, namely, "The Court is to be at liberty to draw inferences of fact"; but on examination if it turns out, as here, that the only duty which it is sought to throw on the Court is to draw such inferences from which certain legal consequences admittedly follow, this only shews that the question for decision and judgment is one of fact only.

All this being so, I am of opinion with your Lordships that the case was one which the Divisional Court was not bound to entertain. As soon as it became apparent to the learned judges of that Court—and this seems to have been at an early stage of the argument—that the special case raised only a question of fact for their determination, they would have been warranted in declining to give judgment on it; and with a special case in which the statements left so much to conjecture, and where the parol evidence of the parties would in many respects have supplied satisfactory grounds for decision one way or another, in place of mere grounds for speculation as to what the parties

meant, and said, and did, it is not unlikely that the ends of justice would have been better served had this course been taken. It is apparent that the learned judges yielded to the entreaties of both parties in entertaining and disposing of the case, and I agree in thinking that the proceeding was extra cursum curiæ, and that the decision of the dispute between the parties was of the nature of an award by arbiters, as, indeed, the learned judges of the Divisional Court seem themselves to have thought, as appears not only from the terms of Wills J.'s judgment, but from the observations of both judges when the defendant proposed to appeal.

It follows, on the authority of the series of cases cited by my noble and learned friend, Lord Watson, that as the plaintiff maintained the finality of the decision of the Divisional Court in the Court of Appeal, their Lordships, in place of dealing with the merits of the cause, should have sustained that contention, and held that the proceedings and decision having been extra cursum curiæ, they could not entertain the appeal.

On these grounds I agree in thinking that the judgment of the Court of Appeal should be recalled, and that of the Divisional Court restored.

Order of the Court of Appeal reversed, and order of the Queen's Bench Division restored with costs here and below: cause remitted to the Queen's Bench Division.

Lords' Journals, December 16, 1895.

Solicitors for appellant: *Steavenson & Couldwell, for T. Piercy, Leeds.*

Solicitors for respondent: *Vincent & Vincent, for Peckover & Scriven, Leeds.*

[HOUSE OF LORDS.]

M. L. (E.) 1896 March 2.

Ex parte GEORGE STAPYLTON BARNES, APPELLANT.

Company—Winding-up—Public Examination of Promoters, Directors and Officers—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

The Court has no jurisdiction to direct any person to be publicly examined under s. 8, sub-s. 3 of the Companies (Winding-up) Act, 1890, unless the official receiver has made a "further report" under sub-s. 2 from which it appears that in his opinion a fraud has been committed by a person in the promotion or formation of the company, or by a director or other officer of the company in relation to the company since its formation.

And the power to direct a public examination of the persons mentioned in sub-s. 3 does not apply to any one of them against whom a primâ facie case of fraud has not been disclosed by the "further report" of the official receiver.

AN order having been made on November 7, 1894, that a company entitled the English and Scottish Mercantile Investment Trust, Limited, be wound up by the Court, the official receiver on March 11, 1895, made his preliminary report under the Companies (Winding-up) Act s. 8, sub-s. 1. The report discussed (inter alia) the causes of the failure and insolvency of the company, the distribution of a cheque for 2000*l.* among some of the retiring trustees, and other matters in the formation and conduct of the company, and expressed the official receiver's opinion that further inquiry was desirable as to the failure of the company and the conduct of its business, and that for that purpose a public examination of certain persons (trustees and other officers of the company) named in the schedule should be held. Upon an application by the official receiver for an order directing the attendance of those persons for examination pursuant to s. 8, the Court of Appeal (Lindley and Kay L.JJ.), affirming the decision of Vaughan Williams J., refused to make any order. Against these decisions the official receiver appealed. (1)

(1) Sect. 8 of the Companies (Winding-up) Act, 1890, c. 63, says:—

"(1.) Where the Court has made an order for winding-up a company, the official receiver shall, as soon as practicable after receipt of the state-

Sir R. E. Webster A.-G., and *Ingle Joyce* (*W. B. Lindley* with them), for the appellant. The Courts below gave no

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ment of the company's affairs, submit a preliminary report to the Court:—

"(*a*) As to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

"(*b*) If the company has failed, as to the causes of the failure; and

"(*c*) Whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

"(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

"(3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company.

"(4.) The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel.

"(5.) The liquidator where the official receiver is not the liquidator and any creditor or contributory of the company may also take part in the examination either personally or by solicitor or counsel.

"(6.) The Court may put such questions to the person examined as to the Court may seem expedient.

"(7.) The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost, prior to such examination, be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit. Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him. They shall also be open to the inspection of any creditor or

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formal judgment, but followed the decision of *In re Great Kruger Gold Mining Co., Ex parte Barnard* (1), from which this is in substance an appeal. The question is whether the words in s. 8, sub-s. 3, "after consideration of any such report," refer to the preliminary report mentioned in sub-s. 1 as well as to the further report mentioned in sub-s. 2. Grammatically and naturally they do. If it had been intended to exclude the preliminary report, it would have been easy to say "after consideration of any such further report." There is no adequate reason why the narrower construction should be adopted, the Court having a discretion which would enable it to prevent any injustice being done. The preliminary report may, and in this case does, disclose reasons for a further inquiry and a public examination of certain persons. It is suggested that there may be a private examination under s. 115 of the Companies Act, 1862; but a private examination is not so effectual and searching as a public one. The value of the Act will be diminished if the construction of the Court of Appeal be affirmed. Fraud is not the only matter mentioned in sub-s. 2, and the construction now called in question gives an undue prominence to a charge of fraud. The preliminary report is compulsory on the official receiver; the further report is optional. Why should the official receiver be compelled to make a further report and make a formal charge of fraud when he is possibly not in a position to do so?

[LORD HERSCHELL. In order that the person to be examined may know what charges he has to meet. Sub-s. 7 shews the

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contributory of the company at all reasonable times.

"(8.) The Court may, if it thinks fit, adjourn the examination from time to time.

"(9.) A public examination under this section may, if the Court so directs, and subject to general rules, be held before any judge of county courts, or before any officer of the Supreme Court, being an official referee, master, registrar in bankruptcy, or chief clerk, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or in the case of companies being wound up by a Palatine Court, before a registrar of that Court, and the powers of the Court under sub-sections six, seven, and eight of this section may (except as to costs) be exercised by the person before whom the examination is held."

(1) [1892] 3 Ch. 307.

intention of the Legislature that no person should be publicly examined who has not been charged with fraud. Otherwise the provision as to costs would work a monstrous injustice.]

The Court of Appeal did not think there would be any injustice, for they decided in *In re Trust and Investment Corporation of South Africa* (1) that a person might be publicly examined without having been charged with being a party to any fraud. Sub-s. 3 says "any person" who has occupied a certain position towards the company may be directed to be publicly examined. The construction suggested would make the words read "any person reported guilty of fraud." The object is to obtain information.

[LORD WATSON referred to *In re General Phosphate Corporation.* (2)]

LORD HALSBURY L.C. My Lords, I have endeavoured, as well as I could, to keep my mind free from the prejudice which may have existed in it from my memory of what took place at the time of the passing of the Act which we have to construe, and simply to look at the language of the statute, as if I had never heard of it before.

I cannot help thinking, with the utmost deference to the judicial opinions that have been given, that the provisions are reasonably plain. The Legislature, for very obvious reasons—obvious I mean when one looks at what the course of legislation has been with reference to the formation of companies and the conduct and management of them—thought that there might be cases in which it would be very desirable to have persons who might be supposed to have some personal interest in the conduct and management of companies brought to the test of a public examination; and accordingly the Legislature, where the Court has made an order for winding up a company, imposed upon the official receiver a duty as soon as practicable after the receipt of a statement of the company's affairs to submit a preliminary report to the Court. That preliminary report was to contain "the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities."

(1) [1892] 3 Ch. 332. (2) [1895] 1 Ch. 3, 10.

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That was an actual duty cast upon the official receiver. If the company had failed, he was to report "as to the causes of the failure," and whether, in the opinion of the official receiver, "further enquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof." So far there seems to be no difficulty, and no necessity for further exposition of the object and meaning of the legislation that was then arrived at.

But then there came what seems to me to be an absolutely independent and separate set of provisions, and that was that if the official receiver thought fit he was to make a further report. The expression "if he thinks fit" must of course mean if he arrives at a judicial conclusion in his own mind that such facts are before him, and in proof, that it becomes his duty. It is left to him to do it if he thinks fit; it is not made necessary for him to do it in every case, but only in such cases as in his judgment demand such a course to be pursued. "If he thinks fit" he is to "make a further report or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director, or other officer of the company, in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court."

My Lords, the next sub-section, upon which the whole question turns, begins with these words: "The Court may, after consideration of any such report." Now, the first question which arises is as to a point on which Mr. Ingle Joyce relies: he says he relies upon the literal meaning of the words. I confess, to my mind, reading those words as I have read them, it seems to me reasonably plain that the word "such" there refers to the last preceding provision, and that what the draftsman was doing was this: after having provided for these general reports which have reference to the status and conduct of the company and its affairs he goes on to provide that where a specific report has been made with reference to some person who has committed a fraud (I will say a word presently as to what I mean by "some person"), the Court is then invested

with a new jurisdiction. "The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as a director or officer of the company."

Now, in the first place, it is obvious to inquire what can be the sense or meaning of those provisions, unless they have reference to the report which calls attention to the fact that some person has committed a fraud in the promotion or formation of the company, or since the promotion or formation of the company. Those two provisions seem to be correlative. What is the sense or meaning of them unless they are correlative? And if they are, certain consequences are to follow. What are the consequences? At first sight one would say that, if the object is a public examination, and if the public examination is to be upon the subject which has been by the hypothesis called to the attention of the Court by any such report, the person against whom the allegation is made is naturally the person who is to be brought before the Court and examined in respect of it. I mean, the broadest possible view of any such legislation would at once suggest that the person who has been reported as guilty of fraud is to be examined, and he is to be summoned to answer upon the subject. Certain consequences follow upon that. If he is summoned, and if he is exculpated, he is to get his costs; if not, he is to be brought there at his own expense. There are provisions whereby before he is examined, "The person examined shall *at his own cost*, prior to such examination, be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions," and so on. If all these provisions have reference to a person who is incriminated by the report, and who is brought there in the position of a person against whom a suggestion is made that

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he has been guilty of fraud, the whole system, the whole code thereby created, is intelligible and rational, and one can understand what the meaning of each part of it is; each part of it reflects light upon the rest. But if because a preliminary case has been made against A. as being guilty of fraud—if because A. has been in that sense incriminated by the official receiver, B. can be summoned and made subject to all these consequences, although no preliminary charge of fraud has been made against him at all, the whole thing becomes irrational and unintelligible.

My Lords, I confess I entertain not the smallest doubt that the meaning of this legislation is that, in order to give the Court jurisdiction to make such an order, there must be a finding of fraud, and a finding of fraud against an individual who is thereby made subject to being summoned before the Court, and is compelled to answer, whether the answer incriminates him or not, but, being exculpated, receives his costs. I confess I am unable, looking at the whole of the legislation on the subject, to entertain the least doubt that that was what the Legislature intended, and I am a little surprised, I confess, that there should have been any doubt that fraud must be found; by which I do not mean that the particular word "fraud" must be used, but that such facts must be found by the official receiver as suggest fraud against the person incriminated; and that there must be an individual person incriminated: it is not enough that there is a general finding that fraud must have existed somewhere, which would mean nothing; but there must be an individual person pointed to and in respect of whom all these different provisions, for his protection as well as for his being made an example of, become perfectly reasonable. In the event of there being no fraud found, or in the event of there being no individual pointed out as being suggested to be guilty of fraud, I entertain no doubt that the Court has no jurisdiction to make any such order for a public examination.

All the observations that have been addressed to us with reference to the necessity of an inquiry and so forth are disposed of by the mere existence, unrepealed, of the 115th section

in the Act of 1862. There are there ample means of inquiry; no injustice or want of investigation into the affairs of the company can possibly occur if that provision is put into force. This later provision is of itself and by itself a kind of penal section against a fraudulent director, officer, or promoter; and, inasmuch as it is directed to that person and that person alone, it seems to me that it follows as essential to the jurisdiction of the Court that there should be a preliminary finding, which is the foundation of that jurisdiction, namely, that fraud has been committed by the individual person who is pointed out by the report; and, in the absence of that finding, I am of opinion that the Court would have no jurisdiction.

Under these circumstances I move your Lordships that this appeal be dismissed.

LORD WATSON. My Lords, I am of opinion that the Court has no statutory jurisdiction to direct a public examination under sub-s. 3, except upon consideration of a further report made by the official receiver in terms of sub-s. 2. I am also of opinion that the power committed to the Court by that subsection has no application to any one of the persons therein mentioned who is not inculpated in this sense that a primâ facie case of fraud on his part is disclosed by the further report.

I therefore concur in the judgment that has been moved.

LORD HERSCHELL. My Lords, I am of the same opinion. I think that the natural construction of the words "any such report" in sub-s. 3 is to refer them to the report or reports which are mentioned in sub-s. 2. But in addition to that, it seems to me that the other provisions contained in the section make it clear that such must have been the meaning. Sub-s. 7 applies to every case in which an order for examination is made; and I think sub-s. 7 is only reasonably applicable in the case of a person inculpated in a report of the official receiver. Of course, I do not mean for a moment to suggest that the official receiver must use any particular language in the report which he makes under sub-s. 2; it must appear from that report that in his opinion a fraud has been committed by A. or B. or C.,

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as the case may be, in order to justify an order for the examination of A. or B. or C. Of course, no form of words would be necessary; and although the matter is left to the discretion of the official receiver, I think none the less it would be his duty to exercise that discretion in the particular way of making a report, if in his opinion there were a case of fraud established by the facts, against any particular person or persons.

Now, my Lords, these provisions I think must be read in the light of the provisions of the Companies Act 1862 c. 89, which were left existing when this later legislation was passed. The Court had the fullest power to summon before it anyone it pleased within the limits specified in s. 115 of that Act, which I think would have included any person who could give information that would lead to proceedings for the recovery of money for the benefit of the company whom it thought fit. And I think that an object, if not the only object, of the first sub-section of this s. 8 was to impose on the official receiver at an early period the duty of bringing before the Court information upon certain matters connected with the company which would be very important in guiding the judgment of the Court as to the persons who ought to be summoned under s. 115. I think there is a purpose amply sufficient to be served by the report under sub-s. 1 without supposing that it was intended upon that report to found the proceedings referred to in sub-s. 3 and the following sub-sections.

Now, in s. 115 of the Act of 1862, although all the persons there referred to might be summoned, they could only be summoned on a tender to them of their reasonable expenses of coming to be examined. When we deal with the provisions of 1890, which it must be remembered are intended to operate side by side with s. 115, we find that the expense in the first instance is cast absolutely upon the person to be examined. He must bear even the expense of knowing what he is to be examined about; the official receiver's report is only to be had upon those terms; and the later provisions (as to which I will say something in a moment), about allowing him costs if he exculpates himself from the charges, shew that intention clearly. Now, that is perfectly intelligible if you suppose that

the person referred to in sub-s. 3 and the subsequent sub-sections is an inculpated person, otherwise it is unintelligible. If he is not a person who is primâ facie to blame, why should he be put to the expense of ascertaining what the charge against him is, why should all the costs be thrown upon him, and why should he not have any expenses tendered to him? It is quite unintelligible why he should be put in that position if he is a person in no way appearing to be inculpated.

When one comes to look at sub-s. 7 it is quite clear that the Court can only allow expenses to a person ordered to attend for examination if, in the opinion of the Court, he is exculpated from any of the charges made or suggested against him. Both the Attorney-General and Mr. Ingle Joyce conceded that those words were only applicable when the person was inculpated in the report of the official receiver. If their construction is right, you have this preposterous result: you have A., we will say, inculpated in the report on a charge of fraud, it is suggested that B. and C. were co-directors with him or co-officials of some kind or other, and you have an order made, and, as they say, properly made, for the examination of A. and B. and C.; and on the examination it turns out that none of these persons were to blame. Then A. applies for his costs. "Yes," say the Court; "you are exculpated and we will give you your costs." But when B. and C. come, the answer is, "No; you have not been exculpated because you were never charged, and therefore you must bear the expenses yourself." Such legislation would be nothing short of preposterous. The only construction of the legislation that can make it reasonable is that no persons can be ordered to attend and be examined at their own expense but those who are primâ facie inculpated. It is quite reasonable that they should be required to attend at their own expense. They are saved from injustice by the provision that if they are exculpated the Court can, and doubtless will, give them their costs. If on the other hand, whilst inculpated persons would be allowed their costs, other persons could be examined at their own expense who could not be allowed their costs, however clear it might be that they had done nothing whatever that could be the subject of blame, the

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provision would be certainly very harsh, very unjust, and very unreasonable.

Therefore, when all the provisions are regarded together, and also the enactment existing in s. 115, it seems to me that the intention of the Legislature is reasonably clear. Nor is there any mischief, that I can see, likely to arise from such a construction. If it were the case that the report of the official receiver on such a point must be made once for all, so that if there appeared a primâ facie case for a public examination of A. the official receiver never afterwards could make a report which would lead to the public examination of B. or C., it might be said that mischief might arise. But it is clear that if there is not at the outset a case of fraud shewn against anybody but A., B. and C., who are officials of the company and are supposed to know something, or may perhaps be suspected of being concerned in something which was improper, can still be summoned for examination under s. 115. It may well be that something which transpires in the public examination of A. will shew the necessity of summoning B. or C. under s. 115. If, when they are examined under s. 115, it turns out that there is no cause for believing them to have been guilty of fraud, the matter will of course end there; they will have been examined, they will have given all the information they can, and no further step will be necessary. But if that leads to a primâ facie case of fraud against them, they are not to be exempted from a public examination; it is still open to the official receiver to make a further report about their conduct, upon which their public examination will ensue.

It seems to me, therefore, my Lords, that while the construction which your Lordships' House is putting upon this section will in many cases prevent injustice, it will in no case prevent justice being done and the fullest inquiry being made in all legitimate cases.

LORD MACNAGHTEN. My Lords, I am entirely of the same opinion.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I also concur, and I only venture to add to what has been said by my noble and learned friend opposite (Lord Herschell) that it occurs to me that there might be an examination of directors other than those named originally, without having recourse to s. 115. I venture to suggest that if it appeared upon the examination of a person, A., who had been inculpated, or even from information which the official receiver had obtained otherwise, that B. and C. were in a somewhat similar position, then the official receiver might in that case make a second or further report without having recourse to the powers under s. 115. In all other respects I quite agree with what my noble and learned friends have said.

LORD HERSCHELL. In consequence of what my noble and learned friend has just said, I wish to explain that I did not intend to imply that procedure under s. 115 would be a condition precedent to any further report justifying a further order for public examination, but merely that what came out on an examination under s. 115 might render such public examination desirable, and that it might be had notwithstanding the previous report.

LORD DAVEY. My Lords, I concur.

Orders appealed from affirmed and appeal dismissed.

Lords' Journals March 2, 1896.

Solicitor: *Walter Murton.*

[HOUSE OF LORDS.]

H. L. (I.) 1896 *March* 12.

THE RT. HON. CHARLES WILLIAM, EARL OF MOUNTCASHELL . . . } APPELLANT;

AND

HELEN STIRLING MORE-SMYTH. . RESPONDENT.

Estate pur Autre Vie—Special Occupant—Devolution of Estate—Wills Act (1 *Vict. c.* 26) *s.* 6.

An estate pur autre vie was created by the conveyance of the appellant's life estate in lands to the appellant and the respondent to hold to the use of them and their heirs upon certain trusts, with a declaration that all the estates and interests conveyed to the respondent were conveyed to her as trustee for an infant:—

Held, that the infant's equitable estate was not an estate to him and his heirs, and that there being no "special occupant" the infant's estate upon his death passed to his administratrix under s. 6 of the Wills Act 1 Vict. c. 26.

The decision of the Court of Appeal in Ireland ([1895] 1 I. R. 44) affirmed.

STEPHEN, the late Earl of Mountcashell, a bachelor and a lunatic (so found), was tenant for life of the Mountcashell estates in Ireland, his brother, the appellant, being tenant for life in remainder, and Richard the appellant's eldest son tenant in tail in remainder.

By an agreement of November 25, 1886, between the appellant and Richard, after reciting an intended purchase by them of the late Earl's life estate, it was agreed (inter alia) that after the completion of the purchase the income of the estates (after certain payments) should during the life of the appellant be divided equally between him and Richard.

This intended purchase was not carried out, Richard having died January 3, 1888, leaving a widow, the respondent, and an infant son Claude, who became tenant in tail in remainder.

By an agreement of February 24, 1888 between the appellant and the respondent the appellant covenanted with the respondent (inter alia) that if the purchase of the lunatic Earl's life estate should be sanctioned by the Court all the rights and

interests to which under the agreement of November 25, 1886, if Richard were living and that agreement perfected he would be entitled should as between himself and Claude belong and pass to Claude absolutely.

By an order of the Lord Chancellor of Ireland of March 3, 1888, it was ordered (inter alia) that the committee of the lunatic Earl's estate should execute to the appellant, and to the respondent on behalf of Claude, a proper conveyance of the Earl's life estate. By deed of July 16, 1888, a conveyance of the lunatic Earl's life estate was executed by the committee, and by deed of December 10, 1888, after reciting the agreements and other documents the appellant as beneficial owner conveyed to the appellant and the respondent all the lands to hold unto and to the use of them and their heirs during the appellant's life upon the trusts and by, with, under and subject to the powers, provisoes, agreements and declarations, contained in the agreements of November 25, 1886 and February 24, 1888, or such and so many of the same as were then capable of taking effect. And it was thereby expressly declared by the respondent that "all the estates and interests by the said deed of July 16, 1888 and by these presents conveyed to her (and subject and as in manner therein respectively stated) were and are respectively conveyed to her as trustee for the said Claude."

On November 9, 1889, the lunatic Earl died and the appellant became Earl of Mountcashell. On October 1, 1890 Claude died an infant.

The respondent as administratrix of Claude having brought an action in Ireland for an account against the appellant, Porter M.R. made an order declaring (inter alia) that on Claude's death the moiety of the estates to which he became entitled by virtue of the agreement of February 24, 1888 devolved upon and became vested in the appellant as Claude's heir-at-law. Upon appeal from that part of the order the Court of Appeal in Ireland (Walker L.C., Palles C.B. and Fitzgibbon L.J.) discharged the order except as to costs, and declared that the respondent as administratrix was entitled under the agreement of February 24, 1888, to one moiety of the

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rents and profits of the Mountcashell estates received by the appellant under the agreement which accrued due during Claude's life and also since his death; and further declared that on Claude's death the moiety of the estates to which he became entitled by virtue of the said agreement devolved upon the respondent as Claude's personal representative; and ordered an account to be taken accordingly; the appellant to pay the respondent the costs of the appeal. (1)

Against this decision the present appeal was brought.

March 9, 10, 12. *Levett Q.C.* and *Thomas Douglas*, for the appellant. Under the deed of December 10, 1888, the respondent took an estate pur autre vie in trust for her infant son, Claude. Her estate was an estate of quasi-fee, a descendible freehold: (see Burton's Law of Real Property, 240, s. 730). Therefore the equitable estate of Claude was also a descendible freehold and an estate of quasi-fee which went to his heirs. That this was the intention and effect of the deed is shewn by the reference to the agreements and by the declaration of trust at the end of the deed, under which Claude took in equity the same estate as the respondent took in law. It is as if it had been expressly declared that the respondent was trustee for Claude and his heirs. The judgment of the Master of the Rolls in Ireland (1) states the appellant's contention fully and clearly. If this were the case of a will there is no doubt that Claude's estate would pass to his heirs: *Wall* v. *Byrne*. (2) And in a deed words of inheritance are not necessary if the intention can be discovered to pass the whole estate: *McClintock* v. *Irvine* (3); *Brenan* v. *Boyne* (4); *Coke* v. *Brady* (5): see also *Doe* d. *Lewis* v. *Lewis* (6) (which is distinguishable, the word "assigns" being used and no words to pass the whole estate) and *Reynolds* v. *Wright*. (7) The judgment of the Lord Chancellor of Ireland (8) to a certain extent supports the decision of the Master of the Rolls.

The agreements referred to in the deed of December 10, 1888,

(1) [1895] 1 I. R. 44.
(2) 2 J. & L. 118.
(3) 10 Ir. Ch. R. 480.
(4) 16 Ir. Ch. R. 87.
(5) 4 L. R. Ir. 653.
(6) 9 M. & W. 662.
(7) 2 D. F. & J. 590.
(8) [1895] 1 I. R. at pp. 68, 69.

were executory only, if they had been carried out properly the estate pur autre vie would have been limited to Claude and his heirs: 1 Co. Litt. 41 b. For if Richard had not died and the agreement of 1886 had been carried out the limitation would have been to Richard and his heirs, and Claude stood in Richard's place. The Wills Act cannot affect the construction of written agreements and deeds.

Warmington Q.C. and *C. A. O'Connor Q.C.* (of the Irish Bar; *Charles Church* with them), for the respondent. Sect. 6 of the Wills Act (1 Vict. c. 26), repeating in substance provisions of the Statute of Frauds, enacts "That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant." It must be remembered that in the present case the Courts are dealing not with a disposition of an old estate pur autre vie but with the creation of a new one. If it had been intended that Claude's estate should not go to his personal representative, his heirs would have been named. His heirs not being named there was no special occupant of his equitable estate and on his death his estate passed by virtue of the Act to his administratrix the respondent. It is admitted that under the agreements there was no special occupant of Claude's estate, and the respondent had no power to alter the quality of Claude's estate by the deed of December, 1888. Even if she had the power it was not exercised; the deed adopts the language of the agreements and leaves the equitable estate as it was. An estate pur autre vie is not a descendible freehold. When the heirs are named, the heir takes as a special occupant, per formam doni and not by descent: 3 Bac. Abr. "Estate for Life and Occupancy." There is no authority for the contention that an equitable estate such as Claude took passed to the heir: not

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one decision to that effect, at the most some dicta. *Philips* v. *Philips* (1) is in the respondent's favour, and if the report in 2 Vern. be correct almost covers the present case. So with *Doe* d. *Lewis* v. *Lewis* (2) and *McDermott* v. *Balfe*. (3) The decision of Sir E. Sugden in *Wall* v. *Byrne* (4) was hastily given, his Lordship refusing to hear the counsel against whom he decided. And no one has ever been able to find the decision in England to which he referred. There are decisions prior to *Wall* v. *Byrne* (4) which do not support the Lord Chancellor's judgment, namely, *Doe* d. *Kerr* v. *Cassidy* (5); *Jack* d. *Alexander* v. *Jamieson* (6); *Blake* v. *Jones* d. *Blake*. (7)

[They also cited *Witter* v. *Witter*. (8)]

Levett Q.C. in reply.

LORD HALSBURY L.C. My Lords, this case has been amply and learnedly argued, but to my mind a vast amount of learning has been introduced which is not relevant to this case. It has not been and cannot be denied that apart from any disposition of this estate pur autre vie to the heir the law gives it to the executor. Therefore the only thing we have to look to is to see whether or not there has been a disposition of it to the heir. Now it is not denied that in express terms it is not given either by the executory agreements or by the deed itself executed in pursuance of those executory agreements. To my mind it is manifest that we must abide by the terms of the deed, and by the terms of the deed no such disposition is made of it as would take it away from the executor. It seems to me, my Lords, that those observations dispose of this case entirely.

I have followed with great interest the learned argument presented to us, but cannot see anything in the executory agreements or the deed to take this case out of that which the law lays down as the destination of an estate of this quality and character.

I observe that one of the learned judges below speaks of an exhaustive and entertaining discussion upon the subject of an estate pur autre vie, and I think one of the learned counsel

(1) 1 P. Wms. 34; 2 Vern. 430.
(2) 9 M. & W. 662.
(3) I. R. 2 Eq. 440.
(4) 2 J. & L. 118.
(5) 1 Hud. & B. 222, n.
(6) 1 Hud. & B. 225, n.
(7) 1 Hud. & B. 227, n.
(8) 3 P. Wms. 99.

to-day said that there was something comic about it. I confess that to my own mind there is something which satisfies both of those phrases when one looks at the learned discussions that have taken place in ancient times and sees people entangled in verbal cobwebs of their own spinning, and endeavouring to get out of their entanglements. But apart from that antiquarian interest it seems to me that there never was a simpler or more obvious case than this of the operation of the statute. Upon this simple ground I move your Lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed with costs.

LORD WATSON. My Lords, I concur in the judgment that has been moved. I think the decision of the Appeal Court is clearly right, and I am quite satisfied with the reasons which have been assigned for it by the Lord Chief Baron and Fitzgibbon L.J.

LORD HERSCHELL. My Lords, I will only trouble your Lordships with a word or two upon this case. It is common ground that this estate passed to the executor under the Wills Act and not to the heir, unless it can be shewn that the heir was named as special occupant, or at least was special occupant. Now in the deed which one has to look at, in the first instance the heir is not named in any way. The argument of the learned counsel for the appellant is that because the heirs of the grantees are named, therefore you are to treat the heir of the infant who is the cestui que trust as being also named. There appears to be no authority for that, and I can see no reason for it. It is said that if the executory agreements had been carried out as they ought to have been, the heir of the infant would have been named. My Lords, that also is a proposition to which I am unable to give my assent. Looking to the terms of the executory agreements I see no reason for coming to that conclusion. The infant obtained the full benefit of the whole estate held on his behalf by his mother, and he obtained that just as much if on his death it passed to his executor as if on his death it descended to his heir.

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LORD MACNAGHTEN. My Lords, I am of the same opinion. If the case depended solely on the two agreements (the agreement of 1886 and the agreement of 1888) it would, I think, be impossible to contend that the question was not directly concluded by the very terms of the Wills Act. So far, I think, all the learned judges are in accord. For the rest I agree entirely with the decision of the Court of Appeal, and particularly with the judgment of the Lord Chief Baron.

I do not think the mother had any power to alter the estate designed for the infant, and further I do not think she has done anything purporting to alter it. The notion that the equitable estate or interest of the infant is to take its colour or quality for the purpose of transmission from the legal limitations in the conveyance by some sort of principle of attraction or relation back, and that thus a special occupant may be supplied, seems to me to be a fanciful notion without any foundation in reason or authority. The legal limitations in the conveyance were, I think, introduced simply for the purpose of protecting and preserving the equitable interest which the infant took under the agreement of 1888, and which he had at the date of the conveyance.

LORD MORRIS. My Lords, I concur.

LORD DAVEY. My Lords, the chief argument on the part of the appellant has been that the devolution of the legal estate in the trustee determines by some sort of attraction the devolution of the equitable estate of the infant. My Lords, I agree with what has been said on this point. There is, in my opinion, neither reason nor authority for that proposition. The nature and extent of the equitable interest must be determined by the words by which it is created. Now it must be admitted that where an estate pur autre vie, whether equitable or legal, is created without any designation of a special occupant, the law casts it in the event of the death of the grantee, upon the executor, and it is for those who say that it ought to go to the heir to shew that there are some words in the creation of that equitable or legal estate pur autre vie which throw it upon a

special occupant. It has long since been established that in determining the quality of an estate pur autre vie, that is whether it goes to a special occupant or to the executor by statute, you look to the terms of the last conveyance of the estate, and not to the original grant, to ascertain whether it is to go to the heir or to the legal personal representative. If it is to go to the heir, my present impression is that express words are necessary and that in a deed, at all events, the word "heir" must be used for the purpose of designating the special occupant. It occurred to me in the course of the argument that the learned counsel for the appellant could not get on in this case without first rectifying the deed. My Lords, supposing it to be open to him to ask your Lordships to do so, that is to say to insert words in the deed declaring a trust which we do not find there, I am bound to say I see nothing in the agreements from which your Lordships can infer that the declaration of trust in favour of the infant, according to what I hold to be its legal interpretation, is contrary to the intention of the parties to the agreements.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals March 12, 1896.

Solicitors for appellant: *Pattinson & Brewer for W. Buckley, Dublin.*

Solicitors for respondent: *Prior, Church & Adams for R. W. Peebles, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 March 20.

THE UNIVERSAL STOCK EXCHANGE, LIMITED . . . . . } APPELLANTS;

AND

DAVID STRACHAN . . . . . RESPONDENT.

Stock Exchange—Gaming and Wagering Contract—Payment of "Differences"—Securities deposited as "Cover"—"To abide the Event"—Action to recover deposited Securities—Gaming Act 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

Where both parties to contracts for the sale and purchase of stocks intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase and delivery or receipt (as the case may be) of the stocks, does not prevent them from being contracts by way of gaming and wagering within the Gaming Act 1845, c. 109 s. 18 and therefore void.

In such transactions securities deposited by one of the parties with the other to secure the payment of "differences" are not deposited "to abide the event" within the meaning of s. 18, and are recoverable by action.

The decision of the Court of Appeal ([1895] 2 Q. B. 329) affirmed.

IN 1893 and 1894 the appellants bought from and sold to the respondent various stocks and shares at the "tape prices" of the day. Bought and sold notes were made out by the appellants in each transaction stating that they acted "as principal or jobber" and subject to "the terms" printed on the back. The "terms of business" (which were signed by the respondent) contained these statements (inter alia):—

"2. Every purchase or sale contracted by the company is a bonâ fide transaction for delivery on a specified settling day, and the company is always prepared, and by means of its capital able to deliver or take up any stock it may at any time have bought or sold, and the contracts entered into by the company are not contracts of gaming or wagering. All bargains are to be completed on the settling day named in the contract, but any customer wishing to postpone completion of a purchase or sale, may arrange with the company (upon terms) for postponement of completion until a future date (carry over), but

the company being always prepared to complete on the settling day originally fixed, may decline to postpone completion at its option.

"3. The company charges no commission or fees of any kind, but charges a fixed rate of interest of 5 per cent. per annum on the purchase-money of all stocks, computed from date of purchase until completion. The buyer to receive from the seller all dividends falling due while the account is ensuing, and the buyer paying all expenses of transfer of stocks."

"6. The completion of all purchases and sales shall take place at the company's office at noon on the day specified in the contract or otherwise as may be mutually agreed upon . . . ."

"8. The company shall have a lien, until the account is closed and properly settled, upon all the stocks, shares, moneys, or other valuables in its possession belonging to customers for the due performance of any contract or engagement which they may have entered into," with power to realize in case of default.

The transactions were for very large amounts, and in no instance were stocks or shares ever delivered. During their progress the respondent handed to the appellants securities for the performance of his contracts. In April 1894 he brought this action against the appellants to recover the securities, alleging that the contracts were gambling transactions for "differences." The defendants claimed to retain the securities as security for a balance which they alleged he owed them for differences and interest. At the trial before Cave J. and a special jury the respondent was called as a witness and a correspondence and other documents shewing the nature of the transactions were put in. The appellants called no witnesses. Cave J. said at the beginning of his summing-up: "the question which you have to try is whether these transactions were real bargains for purchase of stock, or whether they were simply gambling transactions intended to end in the payment of differences . . . . I have no doubt that most if not all of you are perfectly familiar with transactions on the Stock Exchange, but I may make use of that as an illustration of my meaning. A man goes to a broker and directs him to buy and sell so much stock as the case may be. That may be, in the eye of the

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purchaser, a gambling transaction, or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock, if he means to sell again before the settling day arrives, that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it." After referring to the evidence and the "terms of business" the learned judge concluded thus:—

"Notwithstanding those ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them, and that is the only question with which I need trouble you."

The jury found "that the whole of the transactions were gambling transactions, and we are of opinion that everything should be returned to the plaintiff that the law allows."

Cave J. entered judgment that the plaintiff have a return of the securities, or recover from the defendants their value. The defendants having moved the Court of Appeal to set aside the verdict and judgment and enter judgment for the defendants on the grounds that there was no evidence to go to the jury in support of the plaintiff's case and that the judge ought to have nonsuited, that the verdict was against the weight of evidence, and that the judge misdirected the jury (inter alia) in not telling them that the contract in effect was at the option of either party enforceable at law, and in not telling them that there being a contract in existence they must find for the defendants unless there was sufficient evidence before them that both parties had entered into another contract that the existing contract should never be enforced by either party and was to be regarded as merely colourable; and in telling them that if they thought the transactions were by way of gaming and wagering

the plaintiff was entitled to recover the securities; or for a new trial—the Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.) dismissed the appeal. (1)

By the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. . . . ."

March 19, 20. *Sir E. Clarke Q.C.* and *E. H. Pollard*, for the appellants. There was no evidence to support the verdict, no evidence of an agreement written or verbal that shares should not be delivered: the plaintiff himself did not allege in the witness-box that he so intended: intention on both sides is immaterial if no agreement was come to. Where as here there is a contract of sale and purchase with the right to insist upon delivery or receipt of the shares, it is not a wager, even though neither party intend to enforce the right. The existence of the right is enough: *Universal Stock Exchange Limited* v. *Stevens* (2), per Romer J.; *Lowenfeld* v. *Howat* (3), both being decisions upon contracts identical with the present; *Shaw* v. *Caledonian Ry. Co.* (4), per Lord Shand; *Thacker* v. *Hardy* (5); *Forget* v. *Ostigny*. (6) It follows from those cases that even if the present contracts were for the payment of differences only, the power in either party to turn them into real contracts of sale and purchase by insisting upon delivery prevents them from being contracts of gaming and wagering within the Act of 1845. Cave J. ought so to have directed the jury and after the verdict entered judgment for the defendants. [They also contended that the verdict was against the weight of evidence.]

Secondly, assuming that these were void contracts under the

(1) [1895] 2 Q. B. 329.
(2) 40 W. R. 494.
(3) 19 Court Sess. Cas. 4th Series, 128.
(4) 17 Court Sess. Cas. 4th Series, 466, 475.
(5) 4 Q. B. D. 685.
(6) [1895] A. C. 318.

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Act this action must fail, the securities having been deposited with the appellants "to abide the event" within the meaning of s. 18. The Act does not permit the recovery of deposits to secure a void contract. Upon the hypothesis that these were contracts for differences only, the securities, upon which by the terms of business the appellants have a lien for the differences owing to them, were deposited to abide the event of wagers and to secure the payment of the respondent's debts for differences. Even if they were not deposited to abide the event, the respondent could not recover them by action unless he had repudiated the wagers and revoked the authority to the appellants: see *Hampden* v. *Walsh*. (1) Here there was no repudiation or revocation. [They also cited *Manning* v. *Purcell*. (2)]

Bigham Q.C. and *Muir Mackenzie*, for the respondent, were not heard.

LORD HALSBURY L.C. My Lords, this case comes before your Lordships under circumstances which render it unnecessary to deal with it very elaborately or as if it established any very important principle of law. The question of law intended to be argued originally was whether Cave J. misdirected the jury. [His Lordship read the first part of the summing-up set out above.] I am wholly unable to understand, after that direction to the jury, what possible misdirection could have been suggested. That was a most accurate direction to the jury of what they were to find upon the facts before them; and although there is a direction at the close of his summing-up to the jury, which I think it is possible might have been objected to on the other side as being too favourable to the defendants, yet, so far as the defendants are concerned, it appears to me that it is impossible to say that the learned judge did not put before the jury the true question which they had to determine.

Therefore, my Lords, the case resolves itself into an entirely different question, the only question of law I need refer to—namely, whether or not there was any evidence to go to the jury. I cannot doubt that there was a very considerable amount of evidence to go to the jury, and I agree with the Courts below

(1) 1 Q. B. D. 189, 196. (2) 7 D. M. & G. 55.

in saying that one does not adequately discuss that question by taking each part of the case by itself and dissecting the case, and disposing of this or that piece of the evidence as if it were to be looked at alone. The whole transaction has to be looked at, and the whole nature of this institution, whatever it is. Speaking now upon the evidence before us, it appears to me as if it were a concern expressly designed for the purpose of enabling people to gamble in such a way as to evade the provisions of the law. It may or may not be that—it is not necessary to decide whether it is or not—it is not before us at the moment; but I am saying now, as justifying the finding of the jury, that that is what it seems to me to be, looking at the whole nature of the agreement. When I say the agreement I mean the "terms of business" which they call upon a customer to sign, which are to constitute the contractual relations between the parties. I will not rely too much upon the circumstances of suspicion in it, namely, that they say that it is not to be a gambling transaction, but that it is to be a real bonâ fide transaction. When I look at the terms themselves the whole scheme appears to me to be intended with great ingenuity to pretend that there is to be a real transaction, and yet there is to be a payment in respect of the relations between the parties which is only reconcilable in my mind with its being an unreal transaction. They are to get 5 per cent. Each of the learned counsel in turn has been asked what that was for, inasmuch as it was admitted there was no purchase and no sale. In all these transactions not one single purchase or sale is proved to have existed during the whole period in which this business was going on. Then if the real meaning of the parties is this, that there is to be only a payment of differences, what is it but a gaming and wagering transaction between the two as to what shall be the payment on the one side or on the other side? My Lords, if I were on the jury I should come to that conclusion; but I am not under the necessity of trying this question as if I were upon the jury, because the jury have found that it was a gambling transaction, and upon evidence which seems to me extremely satisfactory.

The only question for your Lordships is whether there was

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evidence to go to the jury, because under the circumstances of this case it would be idle to contend that if there was evidence to go to the jury this is a case in which your Lordships would say that the case should be tried again by another jury. I am satisfied, as far as I am concerned, that the jury were right, and that there was ample evidence to go to them which would justify them in the conclusion at which they arrived.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD HERSCHELL. My Lords, I am of the same opinion. So long as the finding of the jury that it was a gambling transaction stands, it is impossible for the defendants to object to the judgment against them which has been pronounced. They say that that finding ought not to stand; that either there ought to be a new trial because the learned judge misdirected the jury, or because the verdict was against the weight of evidence, or that the verdict ought to be entered for them because there was no evidence to go to the jury in support of the plaintiff's case. As to misdirection, I can see none. The learned judge appears to have laid down the law certainly not too favourably for the plaintiff. With regard to the verdict being against the weight of evidence, the learned judge who tried the case and the Court of Appeal have been satisfied with the verdict of the jury, and under those circumstances it would need a very overwhelming case to induce your Lordships to interfere. So far from there being any such case, the verdict is one of which in my opinion no complaint can properly be made.

My Lords, it remains to consider whether there was evidence to go to the jury. The case on behalf of the appellants is this: that when you look at the documents which contain the contract between the parties you see that these were not upon the face of them gaming contracts, but on the contrary appeared not to be gaming contracts, that there was no evidence of anything passing between the plaintiff and the defendants to the effect that the real transaction should not be such as they represented, and consequently that there was no evidence to go to the jury. I cannot accept that view. I think the character of

the documents themselves coupled with the nature of the transactions entered into, the position of the parties who entered into them, and other circumstances which I need not detail, raised a question for the jury whether these were real transactions of commerce or whether they were a mere gambling for differences. I think it is impossible to say that there was no evidence to go to the jury upon the point.

My Lords, it has been said that wherever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither of the parties contemplated that that provision should ever become operative, yet, if it ever may become operative, the contract cannot be by way of gaming and wagering. The proposition amounts to this, that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a court of justice to recover their bets, could compel a court of justice to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision which might in certain events become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency; the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I should require much consideration before I gave my assent to a proposition involving such consequences.

My Lords, I ought to observe upon one other point, though probably it was sufficiently disposed of in the course of the argument. It is said that although it may be a gambling contract, yet nevertheless the very provisions of the section against gaming and wagering prevent the plaintiff recovering the security which he deposited with the defendants inasmuch as it is an "article of value" deposited with them to "abide the event" of a wager. That seems to me not to be the case. It was deposited as security against a debt which might arise from

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a gambling transaction. What the defendants are really seeking is to avail themselves of that security by virtue of a void contract, and it is impossible to say that that was an "article of value" deposited with the defendants to abide the event of a wager. That was not really the nature of the transaction at all.

LORDS MACNAGHTEN and MORRIS concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals March 20, 1896.

Solicitors for appellants: *Last & Sons.*
Solicitor for respondent: *Theodore Allingham.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 *March* 24.

HENRY HOLLIER HOOD BARRS . . APPELLANT;

AND

SMARAGADA HERIOT . . . . . RESPONDENT.

Husband and Wife—Judgment against Married Woman—Separate Estate—Restraint on Anticipation—Arrears of Income—Married Women's Property Act 1882 *c.* 75 *ss.* 1, 19.

Where a married woman is entitled to property for her separate use without power of anticipation, the restraint on anticipation does not apply to income accrued due; and a judgment creditor may enforce the judgment against income which has accrued due at or before the date of the judgment.

The reasoning on this point in *Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559, 570) overruled.

The decision of the Court of Appeal ([1895] 2 Q. B. 212) reversed.

ON November 15, 1892, a Mrs. Loftus obtained judgment against the respondent, a married woman, for 39*l.* 9*s.* debt and 4*l.* 12*s.* costs, for goods sold and delivered. Upon the respondent's marriage in 1872 certain property was transferred to trustees in trust to pay the income to her during her life, but

during her intended coverture for her separate use and without power for her to anticipate the same. Before the date of the judgment there were arrears of income, to which the respondent was entitled, which had not been paid to her by the trustees.

On May 10, 1894, Lawrance J. made an order appointing the plaintiff in the action receiver to receive so much of the accrued income as would satisfy the debt and costs. He further ordered that the receiver should receive so much of the property only as was the separate property of the defendant, not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property should be liable to execution, notwithstanding such restriction. On April 1, 1895, Day J. ordered that the receivership order just referred to should be discharged and set aside, except as to the income of the defendant accrued due and payable at or before the date of the judgment sufficient to satisfy the plaintiff's debt and costs. On the same day he continued an interim injunction of Wright J. restraining the defendant from receiving such income.

The Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.) on June 24, 1895, allowed an appeal by the defendant from these orders and discharged the orders of Lawrance and Day JJ. (1)

The present appellant, having paid the debt and costs of the plaintiff and obtained an assignment from her, was, prior to the hearing of the appeal, substituted for her in all future proceedings.

Feb. 28. *The appellant in person.* The restraint upon anticipation applies only to income before it becomes due, not to income accrued due, and it was always so thought until June 16, 1894, when two judgments were delivered by the Court of Appeal in *Hood Barrs* v. *Cathcart* (2), where it was held that the restraint applied to income accrued due after the date of the judgment. In the first the decision of Lord Esher M.R., A. L. Smith and Davey L.JJ. delivered by

(1) [1895] 2 Q. B. 212.

(2) [1894] 2 Q. B. 559.

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Davey L.J. reserves the point now in question. But in the second judgment (that of Lord Esher M.R., Kay and A. L. Smith L.JJ. delivered by Kay L.J.) the reasoning extends to income accrued due before the judgment. The question, however, as appears from a note in the report, was not fully argued. The reasoning of the judgment delivered by Kay L.J. was followed on December 4, 1894, in *Pillers* v. *Edwards* (1) by the Court of Appeal (Lindley and A. L. Smith L.JJ.), Lindley L.J. implying that but for the judgment delivered by Kay L.J. he would have held the other way. When the present case came before the Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.) the decision in *Hood Barrs* v. *Cathcart* (2) was treated as binding, though as to the point in question it was not a decision, only an obiter dictum. In none of those cases was any reference made to the unreported decision of *Hulbert* v. *Cathcart*, where the Court of Appeal (Lord Esher M.R., Lopes and Davey L.JJ.) on February 26, 1894, decided the very point now in question, and held that the restraint did not apply to income accrued due at the date of the judgment, and that such income was liable to legal process for the purpose of satisfying the judgment debt. The earlier decisions are all to the same effect. In *Rennie* v. *Ritchie* (3) Lord Cottenham's judgment implies that a married woman restrained from anticipation can assign her income as soon as it becomes due. The same principle was decided or stated or assumed in *Harnett* v. *M'Dougall* (4); *Pemberton* v. *M'Gill* (5); *Rowley* v. *Unwin* (6); *In re Brettle* (7); *Fitzgibbon* v. *Blake* (8); *Cox* v. *Bennett* (9), per Kay L.J. himself in the Court of Appeal. Since the Married Women's Property Act, 1882, the inability to contract is gone, and arrears of income can be attached wherever found.

[The following cases were also referred to: *Tullett* v. *Armstrong* (10); *Hulme* v. *Tenant* (11); *Pybus* v. *Smith* (12);

(1) 71 L. T. (N.S.) 788.
(2) [1894] 2 Q. B. 559.
(3) 12 Cl. & F. at p. 234.
(4) 8 Beav. 187.
(5) 1 Drew. & Sm. 268.
(6) 2 K. & J. 138.
(7) 33 L. J. (Ch.) 471.
(8) 3 Ir. Ch. 328.
(9) [1891] 1 Ch. 617.
(10) 1 Beav. 1.
(11) 1 Bro. C. C. 16.
(12) 3 Bro. C. C. 340; and see 1 Ves. Jun. 189.

Moore v. *Moore* (1); *Chassaing* v. *Parsonage* (2); *Harman* v. *Richards* (3); *Butler* v. *Cumpston* (4); *In re Armstrong, Ex parte Gilchrist* (5); *In re Armstrong, Ex parte Boyd* (6), and the cases cited in *Hood Barrs* v. *Cathcart.* (7)]

The respondent did not appear.

The House took time for consideration.

March 24. LORD HERSCHELL, after stating the facts given above, continued:—My Lords, the ground of decision in the Court of Appeal was that the appellant was not entitled to enforce payment of his judgment out of the arrears of income which were due to the respondent at the date of the judgment, inasmuch as, not having come into her hands, they were within the restraint upon anticipation. In arriving at this conclusion they followed the views expressed in the judgment of the Court of Appeal in the case of *Hood Barrs* v. *Cathcart.* (7) The question in that case arose with regard to rents of property to which the defendant was entitled, subject to a restraint upon anticipation, which had accrued due after the date of judgment. But the reasoning of Kay L.J., who delivered the judgment of the Court, applied also to a case where the income had become due to a married woman before the date of the judgment, but had not yet reached her hands. In the subsequent case of *Pillers* v. *Edwards* (8) the decision was treated as governing a case of that description, though Lindley L.J. said: "I confess that but for the decision referred to of *Hood Barrs* v. *Cathcart* (7), I should have thought that the restraint on anticipation was over the moment that the money settled to the married woman's separate use had become due and payable to her. That was my impression, founded on what one may call tradition. Moreover, on looking into the cases, I think that there is considerable authority in support of that view."

The introduction of a restraint on anticipation in settlements

(1) 1 Coll. C. C. 54.
(2) 5 Ves. 15.
(3) 22 L. J. (Ch.) 1066.
(4) L. R. 7 Eq. 16.
(5) 17 Q. B. D. 167, 521.
(6) 21 Q. B. D. 264.
(7) [1894] 2 Q. B. 559, 570.
(8) 71 L. T. (N.S.) 788.

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of property to the separate use of a married woman is of comparatively modern origin. It was decided in *Pybus* v. *Smith* (1) (in 1791) and other cases that, though property was settled upon trust to pay the income to a married woman for her separate use, free from the control of her husband, this did not prevent her from assigning her interest in such income, or charging it with the payment of her husband's debts. The object of settling it to her separate use became thus defeated. It is stated in a note to *Pybus* v. *Smith* (1) that these decisions suggested to Lord Thurlow, in a case where he was trustee, the introduction of a clause in restraint of anticipation. As far as I have been able to ascertain, the earliest form of the clause against anticipation provided that the trustees should, from time to time, pay the income to such person or persons, and for such intents and purposes, as the married woman, by writing signed with her own hand, should, notwithstanding her coverture (but so as the same was not by way of anticipation), direct or appoint, and in default of appointment, and in the meantime, pay the same into her proper hands. (See *Chassaing* v. *Parsonage* (2), where it is stated that a clause of this nature had been introduced into these settlements, in consequence of the decision in *Pybus* v. *Smith*. (3)) A clause in substantially the same form certainly continued in use for a considerable time. It will be observed that it expressly empowered the married woman to alienate the income after it became due, and authorized the trustees to pay it to her appointee. It was only when the appointment was by way of anticipation that it was prohibited. Such a provision was regarded as a sufficient protection for the wife by those who devised the restraint on anticipation. At all events, it is clear that they did not regard an assignment after the income became due as made by way of anticipation. I am, therefore, unable to agree with the view entertained by Kay L.J., that a restraint on anticipation by its nature forbids an alienation before the fund reaches the wife's hands although the income be due to her when the alienation is attempted. In more recent times the clause restraining

(1) 3 Bro. C. C. 340; and see 1 Ves. Jun. 189.

(2) 5 Ves. 15.

(3) 3 Bro. C. C. 340.

anticipation has assumed different forms, but its purpose and effect have, I think, always been the same. That effect was well expressed by Lord Cottenham in *Rennie* v. *Ritchie* (1), where he said that it prevents the person entitled to the income for her separate use "having the dominion till it becomes due."

The restraint on anticipation does not, in my opinion, prevent her disposing of it as she pleases after that date. However she may then deal with it, she does not, I think, do so by way of anticipation any the more when it is in the hands of a trustee than if it were in her own hands. In considering whether there is anticipation, this circumstance appears to me wholly immaterial. If she persuaded the trustee to pay the income to herself before it became due, she would be anticipating it, and the trustee would be guilty of a breach of trust, just as much as if she then gave a charge upon it and the trustee recognised the charge and paid the money accordingly. So, too, after the money becomes due, I think she is not anticipating it, whether she receives it herself or transfers her right to it to another. Such an act does not, in my opinion, fall, on any reasonable construction of them, within the words of the prohibition. I should have arrived at this conclusion had there been no authority on the point one way or the other, but there is, I think, ample authority to support it.

In *Harnett* v. *M'Dougall* (2) the very question arose before Lord Langdale. In that case the trust of a settlement was to pay the dividends of the settled property during the life of Mrs. A. to such person and for such interests and purposes as she by any writing should, "from time to time when and as the same should become due, but not by way of assignment, charge, or other anticipation," direct or appoint, and in default of appointment, into her proper hands, for her sole and separate benefit. Mrs. A. purported to charge the dividends then and thenceforth to accrue with certain debts. A petition was presented for the purpose of giving effect to this charge upon a fund in court. The Master of the Rolls said that to give effect to such a charge would be in direct contradiction to the language and intention of the settlement, and he must therefore

(1) 12 Cl. & F. 204, 234. (2) 8 Beav. 187.

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refuse the petition "except so far as it seeks to dispose of dividends already accrued due."

In *Pemberton* v. *M'Gill* (1) a testatrix bequeathed the residue of her estate to trustees on trust to pay an annuity of 300*l.* to a married woman for her separate use without power of anticipation, and appointed her executrix. She misappropriated assets of the testatrix. The question was, whether her annuity could be applied to making good these misappropriations. The arrears of the annuity due amounted to a considerable sum. Kindersley V.-C. said that he had no hesitation in coming to the conclusion that the arrears of the annuity, "which, of course, were not affected by the restraint on anticipation," must be applied in making good the misappropriations.

Kay L.J., in his judgment in *Hood Barrs* v. *Cathcart* (2), observed that the restriction in that and other cases must have been peculiarly worded. Your Lordships have been furnished with an extract from the will which created the annuity, the arrears of which were in question in *Pemberton* v. *M'Gill*. (1) In that case at all events there was nothing peculiar in the wording of the restriction. The trustees were directed to pay the annuity by four equal quarterly payments into the hands of S. M., or empower her to receive the same during her life for her own sole and separate use, free from the control of her present or any future husband, but so that she shall not have power to alien or anticipate the same. There is certainly no distinction between those words and the language used in the settlement upon the present respondent's marriage.

In the case of *In re Brettle* (3) the trust was to pay the income of the trust moneys from time to time when and as the same should be due and received, but not in the way of anticipation, into the proper hands of the beneficiary for her sole and separate use and benefit, and it was declared that her receipts in writing should alone be effectual discharges for the same. The beneficiary having executed an assignment by way of charge, it was held by Knight Bruce and Turner L.JJ. that it was only operative "as to any arrears which had accrued due" at the date of the assignment.

(1) 1 Drew. & Sm. 268. (2) [1894] 2 Q. B. 559, 570.
(3) 33 L. J. (Ch.) 471.

In *Fitzgibbon* v. *Blake* (1) the Lord Chancellor of Ireland held that a married woman could dispose of and charge the arrears of income settled to her separate use without power of anticipation, on the ground that the clause against anticipation did not apply to such arrears.

My Lords, other cases might be cited, and notably *Rowley* v. *Unwin* (2), before Wood V.-C., in which the same view of the law has been acted upon. And I am not aware of any decision until a quite recent date which is in conflict with it. It was assumed to be correct in *Cox* v. *Bennett* (3) in the Court of Appeal. And, indeed, that Court previous to the decision in *Hood Barrs* v. *Cathcart* (4), and when it was differently constituted, appears to me, in *Hulbert* v. *Cathcart*, to have laid down the law in complete accordance with the view which I am asking your Lordships to adopt. Unfortunately that case was not reported, and it does not appear to have been brought to the notice of the learned judges before whom the case of *Hood-Barrs* v. *Cathcart* (4) came for decision.

If the restriction against anticipation be, as I think it is, inapplicable to the arrears of income now in question, the 19th section of the Married Women's Property Act, 1882, obviously does not affect them.

I move your Lordships that the judgment appealed from be reversed. The effect of this will be to restore the orders thereby discharged. They have, however, become quite ineffectual, inasmuch as the arrears to which they applied have been received by the respondent, there having been, unfortunately, no stay pending this appeal. The respondent must be ordered to repay to the appellant all costs paid by him and to pay the costs of this appeal.

LORD MACNAGHTEN. My Lords, the order under appeal depends upon the proposition that it is not competent for a married woman, entitled for her separate use without power of anticipation, to dispose of income accrued due unless and until it reaches her own hands or the hands of her agent. This

(1) 3 Ir. Ch. Rep. 328.
(2) 2 K. & J. 138.
(3) [1891] 1 Ch. 617.
(4) [1894] 2 Q. B. 559, 570.

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proposition was laid down for the first time in 1894 by the Court of Appeal: *Hood Barrs* v. *Cathcart.* (1) There is nothing to suggest it in the circumstances which originally gave rise to the restraint on anticipation. Nor can it, I think, be supported on principle or on any grounds of convenience or on authority.

In early days, when the effect of placing a married woman in the position of a feme sole with regard to her separate property came to be understood, there was an inclination to treat separate income as a purely personal provision intended for maintenance. Arguments more or less plausible were founded on the various expressions employed in the copious style of conveyancing to limit or develop "separate use." Where the direction was that the income was to be paid "from time to time," it was argued that the prescribed mode of payment was inconsistent with an absolute power of disposition. But the authorities the other way were too strong, and that attempt failed. The usual direction, that the income was to be paid "into the proper hands" of the married woman, and that "her receipts alone were to be a good discharge," was not more efficacious. The Court always said that a married woman might dispose of her separate estate, "and her assignee," to use Lord Eldon's words (*Brandon* v. *Robinson* (2)), "would take it; as if there was a contract entitling the assignee, this Court would compel her to give her own receipt, if that was necessary to enable him to receive it." Nor did words requiring payment to be made on "personal appearance and receipt" carry the matter any further, for no payment, as Lord Cranworth observed (*Ross's Trust* (3)), could be made into her proper hands without her personal appearance. In fact, these and such like expressions, however stringent they appear at first sight, were regarded as "only an unfolding of all that is implied in a gift to the separate use" (*Parkes* v. *White* (4)).

It is important, as it seems to me, to bear this in mind, because the error into which the Court of Appeal appears to have fallen comes, I think, from treating words which are no

(1) [1894] 2 Q. B. 559, 570.
(2) 18 Ves. at p. 434.
(3) 1 Sim. (N.S.) at p. 199.
(4) 11 Ves. at p. 222.

more than the unfolding of the separate use, and which were known and well understood before the clause in restraint of anticipation was invented, as belonging to and forming part of that clause, or, at any rate, as having acquired some new force or efficacy by reason of their connection with it.

The clause which Lord Thurlow introduced into Miss Watson's settlement, and which soon came into general use, was intended to prevent married women dealing with their income in advance. It was designed to prevent the mischief which happened in *Pybus* v. *Smith* (1), where a lady who was a ward of Court, and had the protection of a settlement framed in the master's office, made away with all her property in less than three months. The clause has no application to arrears of income actually accrued due. Indeed, if it had the effect which the Court of Appeal attributes to it, it seems to me that the result would be somewhat unfortunate. Everybody, I suppose, would concede that in limiting income to the separate use of a married woman, without power of anticipation, the primary intention is that if things go wrong she may have a sure and certain provision for her maintenance. But what is to happen if things do go wrong and her income is in arrear? Tenants are sometimes behindhand; mortgagors are not always prompt. If the Court of Appeal is right, it might well happen that a married woman with an ample provision, and striving honestly to live within her income, would be brought into great straits. If her income fell into arrear she would be unable to procure an advance; she could make no contract even for the necessaries of life. It is all very well to prevent a married woman from gathering the fruit, which will be hers in time, before it becomes ripe. When it is ripe, why should she be forbidden to touch it? Why should she have to wait until it falls into her lap? Why should the Court, in its zeal for the security of her property, place it out of her reach when it ought to be in her pocket, and when, perhaps, she wants it most, and all for fear it should come into her husband's hands? So long as things go well there is no reason why a married woman should not let her husband have her income if she knows what

(1) 3 Bro. C. C. 340.

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she is about. If things go amiss there is the restraint on anticipation, ready for use, and as useful for all practical purposes as if it had the effect attributed to it by the Court of Appeal, and without the disadvantage of bringing with it liability to an irregular and a most inconvenient embargo.

Take another case: there is no doctrine, I suppose, better settled than this, that when husband and wife are living together, the wife's separate income received by the husband with her permission, to be inferred merely from conduct and circumstances, cannot be recalled: *Caton* v. *Rideout*. (1) The rule, according to Lord Cottenham, is founded on broad grounds of convenience, and necessary for the peace of families. Now, a clause restraining anticipation is a usual clause. In marriage settlements it is rarely omitted. And it is not an uncommon thing to pay the wife's income to the husband, or to his account with his bankers. The practice prevails equally whether there is a restraint against anticipation or not, and rightly, too, as the law stood before the decision in *Hood Barrs* v. *Cathcart*. (2) But if the Court of Appeal is right, every payment where there is a clause restraining anticipation would be open to question, and it would be "impossible," if I may use Lord Cottenham's words, "to tell what confusion might not be introduced into a family." Your Lordships may remember that this doctrine was lately considered and approved in this House in the case of *Edward* v. *Cheyne* (3), and applied to a case of a Scottish alimentary provision, where a claim was made by the representatives of the deceased wife against the representatives of her deceased husband.

So the case stands apart from authority. Is there any authority to be found for the proposition which has commended itself to the Court of Appeal?

My Lords, I have read all the cases referred to by Kay L.J., but I cannot find in any one of those cases, or in any text-book of authority, even a casual expression supporting the view of the Court of Appeal, or tending to shew that the question has ever been regarded as an open question. In most of the cases

(1) 1 Mac. & G. 599. (2) [1894] 2 Q. B. 559, 570.
(3) 13 App. Cas. 385.

which were cited the point was noticed incidentally and arose without argument. But the stream of authority, when uniform and unbroken, is not less weighty and powerful on that account. There are, however, at least two reported cases, one in England and one in Ireland, where the point was raised directly, and argued and decided. These two cases have stood unchallenged and undoubted for forty years. Neither the one nor the other seems to have been referred to in *Hood Barrs* v. *Cathcart.* (1)

In *Rowley* v. *Unwin* (2), which was decided by Wood V.-C. in 1855, the plaintiff, a married woman, was entitled to the income of 1000*l.* for her separate use without power of anticipation. In January 1845 the trustees allowed the husband to receive the principal, on the understanding that it should be secured by a mortgage of some real estate which he had contracted to buy. The mortgage was not actually executed until February 1849. The lady separated from her husband in the following September. Soon afterwards she filed a bill against the trustees and her husband, claiming, among other things, interest on the 1000*l.* from the time when the sum was received by the husband to the date of the execution of the mortgage, and claiming also a lien on the mortgaged property in respect of such interest. The case was argued for the plaintiff by Mr. W. M. James and Mr. G. M. Giffard. Everything was disposed of at the conclusion of the argument, except the claim to interest on the 1000*l.* "If that point is to be pressed," said his Honour, "I must look into the authorities." In his judgment on a later day the Vice-Chancellor pointed out that the wife could not beforehand consent to the husband's receiving the interest, and that during the period in question the husband had had the use of the money, for which he was bound to pay interest. The case, he said, was the same as if the husband had given a mortgage for it; he would then have been indebted for interest to the wife de anno in annum, and if the wife's trustees had appointed a receiver who had paid the rents of the mortgaged property to the husband, it would fall within the ordinary rule which precludes a wife from recovering the past income of her separate estate, upon the ground of a supposed gift by her of such income to her husband. He could, he

(1) [1894] 2 Q. B. 559, 570. (2) 2 K. & J. 138.

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added, draw no distinction between moneys in the hands of the husband, the interest of which the wife might have claimed, and moneys out on mortgage. His Honour therefore declared that the plaintiff was not entitled to the arrears of interest which she claimed. I cannot imagine a case raising the question more directly, or in a manner more favourable to the claimant.

In Ireland, Blackburne L.C. came to a similar decision, after argument, in the case of *Fitzgibbon* v. *Blake*. (1)

I have not said anything about the form or extent of the order which was discharged by the Court of Appeal. The point was touched upon in the course of the argument. But, as there is nothing left for the order to operate upon, it seems better to leave the question for future consideration.

I cannot help expressing my regret that, under the circumstances, the Court of Appeal did not think it proper to hold the fund in medio pending the appeal to your Lordships' House, and to put the respondent's solicitors on terms to repay the costs in the event of the appeal being successful.

The appeal, in my opinion, ought to succeed ; but I am afraid success will be only a barren victory.

LORD MORRIS. My Lords, I have had an opportunity of considering the judgments which my noble and learned friends have just read, and I entirely concur in them.

LORD HERSCHELL. My noble and learned friend Lord Shand, who is unable to be present to-day, has asked me to say that he concurs in the judgment proposed.

Order appealed from reversed and order of Lawrance J. of May 10, 1894, *and two orders of Day J. of April* 1, 1895, *restored with costs here and below : Cause remitted to the Queen's Bench Division.*

Lords' Journals March 24, 1896.

Solicitors : *Hood Barrs & Co.*

(1) 3 Ir. Ch. Rep. 328.

[HOUSE OF LORDS.]

JAMES PLEDGE . . . . . APPELLANT;

AND

WHITE AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1896 March 26.

Mortgage—Redemption—Consolidation—Assignment of Equity of Redemption by one Deed to one Person.

The doctrine of consolidation of mortgages laid down in *Vint* v. *Padget* (2 D. & J. 611) and other cases to the same effect has been too long established to be now overthrown.

Therefore where the owner of different properties mortgages them to different persons and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mortgagor but also as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title.

The decisions of Romer J. and the Court of Appeal ([1894] 2 Ch. 328; [1895] 1 Ch. 51) affirmed.

THE following statement of the facts is taken from the judgment of Lord Davey:—

Seven different properties are involved in this appeal. There were originally eight, but one of the properties, known as 1 and 2, Shakespeare Terrace, has been dealt with in a separate suit (1), and the rights of the appellants and respondents in respect of that property are not now in question. One James Banks was the original owner and mortgagor of all these seven properties. James Banks mortgaged 34, Bouverie Square (which I will refer to as No. 1), and 5 and 6, Shakespeare Terrace (which I will refer to as No. 2), to John Banks, by deeds dated respectively May 11 and August 26, 1863. He mortgaged Pembury Villa (which I will refer to as No. 3) on October 12, 1865, to S. Hobday, and the other four properties (which I will refer to as Nos. 4, 5, 6, and 7) to other mortgagees by deeds dated from October 18, 1865, to November 24, 1866.

(1) *Minter* v. *Carr*, [1894] 2 Ch. 321; 3 Ch. 498.

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He then made a second mortgage to Brockman of 4, 5, 6, and 7, by a deed dated November 27, 1866. He then made a second mortgage of Nos. 1, 2, and 3, and a third mortgage of 4, 5, 6, and 7, to Brockman and Harrison by one deed, dated August 20, 1868. Or, in other words, on that date James Banks assigned the equity of redemption on all seven properties to Brockman and Harrison. At that date, therefore, Brockman and Harrison might have redeemed 1, 2, or 3, without redeeming the other properties; but they could not have redeemed either 4, 5, 6, or 7, without redeeming all those four properties. Pledge, the present plaintiff and appellant, became the transferee from Brockman and Harrison of their equity of redemption of all the seven properties on April 1, 1885. In the meantime, Brockman, by deeds dated from 1871 to 1873, became the transferee of the first mortgages on Nos. 1, 2, 4, and 5. The defendants and respondents are the surviving executors of Brockman, who died in 1877, and on December 27, 1890, they became the transferees of the first mortgage on No. 3. From that date, therefore, the equity of redemption on all seven properties was vested in the appellant, subject to mortgages on the several properties all vested in the respondents.

In these circumstances, on March 30, 1893, the appellant issued his writ in this action, by which he claims a declaration that he is entitled to redeem No. 2 alone on payment of what is due on the first mortgage of that property only. The defendants claim to consolidate their mortgages on all the seven properties, and that the appellant cannot redeem No. 2 without redeeming their mortgages on the other six properties also.

Romer J. made an order declaring that, as between the plaintiff and defendants only and without prejudice to the rights of any parties not represented, the plaintiff could not redeem any of the properties until payment to the defendants of what on taking the accounts thereby directed should be certified to be due to them on all the mortgages of May 11, August 26, 1863, October 12, 1865, and November 27, 1866; and that accounts should be taken accordingly: in default of payment action

to be dismissed. (1) This order was affirmed by the Court of Appeal (Lord Herschell L.C., Lindley and A. L. Smith L.JJ.). (2)

Against these decisions the plaintiff brought the present appeal.

1895. Nov. 19, 21. *Levett Q.C.* and *Bramwell Davis Q.C.* (*Cator* with them), for the appellant. The action was brought to redeem No. 2 alone, but the appellant now admits that the defendants are entitled to consolidate the mortgages on Nos. 1 and 2, because those mortgages were vested in one mortgagee, John Banks, before the assignment of the equity of redemption to the appellant's predecessors in title; but he claims to redeem those properties without redeeming any of the others, because the mortgages on the others were at the date of that assignment vested in different persons. The appellant's rights cannot be defeated or altered by transactions subsequent to that assignment to which the appellant was not a party. The contingency of a right to consolidate arising out of the subsequent union of the mortgages is not an equity. The only equity affecting Nos. 1 and 2 was the right of John Banks to consolidate the mortgages on 1 and 2 granted to him. There was no right of consolidation against the mortgagor; the assignee cannot equitably or justly be placed in a worse position than the mortgagor: whatever rights the mortgagor had passed to his assignee who ought not to be deprived of them through what was no fault of his. The right to consolidation is a personal equity only, and the position of a second mortgagee cannot be prejudiced by the subsequent union in one person of mortgages which were previously in several: *White* v. *Hillacre* (3) approved in *Jennings* v. *Jordan*. (4) The equity being a personal equity cannot extend to transferees, much less to executors who are mere volunteers. There is no equity affecting the property itself: *Harter* v. *Colman* (5), *Minter* v. *Carr* (6), in both of which the doctrine was held inapplicable against

(1) Reported as *Pledge* v. *Carr*, [1894] 2 Ch. 328. Carr died after action brought.
(2) [1895] 1 Ch. 51.
(3) 3 Y. & C. Ex. 597.
(4) 6 App. Cas. 698.
(5) 19 Ch. D. 630.
(6) [1894] 2 Ch. 321; 3 Ch. 498.

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assignees of the equity of redemption. The Courts below felt themselves bound by *Vint* v. *Padget* (1), though Lord Herschell in this case and Lindley L.J. in *Minter* v. *Carr* (2) had manifestly grave doubts whether it was good law. Turner L.J. in *Vint* v. *Padget* (1) could not distinguish the case from *Bovey* v. *Skipwith* (3) in the 23rd Charles II. But that case, as well as *Titley* v. *Davies* (4) before Lord Hardwicke, are really cases of tacking and not consolidation. *Tassell* v. *Smith* (5) is overruled by *Jennings* v. *Jordan*. (6) In *Baker* v. *Gray* (7) Hall V.-C. decided against consolidation, and treated *Vint* v. *Padget* (1) as being purely a question of notice. *Tweedale* v. *Tweedale* (8) and *Vint* v. *Padget* (1) are the only decisions adverse to the appellant, and they are open to review in this House and should be overruled. There is neither reason nor principle in such a doctrine, and it ought to be abolished.

Cozens-Hardy Q.C. and *Edwin Ward*, for the respondents, were not heard.

The House took time for consideration.

March 26. LORD HALSBURY L.C. My Lords, I have had an opportunity of considering the judgment prepared by my noble and learned friend (Lord Davey) and I am not prepared to dissent from it. I use that form of expression because I confess I lament the conclusion to which it has been found necessary to come, although I believe the strict principle upon which it rests is founded in our law at present, and in dealing with a technical system it is better to adhere to a principle when once established, than to create greater confusion by dissenting from it. I think the principle laid down in *Vint* v. *Padget* (1) has been so firmly established now by authority in our technical system, that I feel more mischief would be done by dissenting from it, than by acquiescing in it. For these reasons I am content with the judgment which my noble

(1) 1 Giff. 446; 2 D. & J. 611.
(2) [1894] 2 Ch. 321; 3 Ch. 498.
(3) 1 Ch. Ca. 201.
(4) 2 Y. & C. Ch. 399.
(5) 2 D. & J. 713; 27 L. J. (Ch.) 694.
(6) 6 App. Cas. 698.
(7) 1 Ch. D. 491.
(8) 23 Beav. 341.

and learned friend has prepared, and shall assent to the motion that he will make.

LORD WATSON. My Lords, I also have had an opportunity of carefully considering the judgment about to be delivered by my noble and learned friend opposite. For my own part, I should have desired if possible to decide otherwise; but I am compelled to say that I concur with the reasonings and the conclusion of my noble and learned friend.

LORD DAVEY. My Lords, the facts of this case are complicated, but they may be stated in a narrow compass sufficiently for elucidating the point of law which is raised. [His Lordship stated the facts given above.] It was admitted at the Bar that the respondents had the right to consolidate their mortgages on Nos. 1 and 2, because the mortgages on those properties were vested in one mortgagee, John Banks, before the assignment of the equity of redemption in both to Brockman and Harrison, the appellant's predecessors in title; but the appellant contends that they are not entitled to consolidate their mortgages on 3, 4, 5, 6 and 7 with their mortgage on No. 2, because these mortgages did not become united in title with the mortgage which he desires to redeem on No. 2 until after the date on which the equity of redemption was assigned to his predecessors in title, namely, August 20, 1868, and his counsel argues that the rights of the appellant and respondents must be determined by the state of circumstances at that date. The question for your Lordships' decision is whether the respondents have the right of consolidation which they claim, notwithstanding that the mortgages which it is sought to consolidate were not united in title with the mortgage sought to be redeemed until after the assignment of the equity of redemption to the present appellant's predecessors in title.

Romer J., by whom the action was tried, and the Court of Appeal, held that the case was covered by the decision of Knight Bruce and Turner L.JJ., in the year 1858, in *Vint* v. *Padget* (1), which it was not competent for them to question,

(1) 2 D. & J. 611.

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and accordingly decided in favour of the respondents. The appellant's counsel admit that they cannot distinguish the present case from that decision, but contend that it is wrong and ought to be reversed by your Lordships.

The equitable rule as to the consolidation of mortgages is not one of those doctrines of the Court of Chancery which has met with general approbation—at any rate as regards its later development. Originally it may have been a right of a mortgagee holding two separate mortgages on estates of the same mortgagor which have become absolute estates at law against the mortgagor and debtor personally to refuse to be redeemed as regards one estate without having his other debt also paid. But it has long been settled that the right of consolidation may be exercised by the transferee of the mortgages as well as by the original mortgagee, and may be exercised in respect of equitable mortgages as well as by a mortgagee holding the legal estate absolute at law; and on the other hand, that it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself.

If *Vint* v. *Padget* (1) had been an isolated decision on a new point, then, notwithstanding the eminence of the learned judges who were parties to the decision, it may be that your Lordships would have felt disposed to review it, and if it did not appear to your Lordships a necessary or legitimate development of the doctrine, your Lordships would probably be disposed to express your dissent from it, as was done with regard to another decision of the same learned judges by this House in the case of *Jennings* v. *Jordan*. (2) But it is obvious that the learned judges did not conceive themselves to be laying down new law. Knight Bruce L.J. said that a long course and series of authorities binding on the Court precluded the possibility of their thinking that there was in the case more than one arguable question, if any, namely, as to the materiality of notice of a second mortgage to a transferee of prior mortgages, and Turner L.J. said it was impossible to distinguish the case from *Bovey* v. *Skipwith* (3) (a case decided in the

(1) 2 D. & J. 611.

(2) 6 App. Cas. 698.

(3) 1 Ch. Ca. 201.

reign of Charles II., to which I will presently refer) on any other ground than as to notice being material.

In *Tweedale* v. *Tweedale* (1) (decided in 1857, the year before *Vint* v. *Padget* (2)) the union of two mortgages made to different mortgagees took place after the assignment of the equity of redemption of both mortgaged properties to the same person. Lord Romilly held that the assignee could only stand in the position of the mortgagor, and be entitled to his rights only, and if the mortgagor could not have redeemed one property without the other, the assignee stood in no better or more favourable position, and was not entitled to redeem one without redeeming the other. Indeed, the contrary seems from the report to have been scarcely argued in that case.

The case of *Vint* v. *Padget* (2) came before Stuart V.-C. in the first instance, whose judgment may be referred to as shewing how entirely that experienced judge considered the point to be settled. "In accepting," he says, "by way of security the equity of redemption of two separate estates, Mr. Lee deliberately incurred the risk of their uniting in one hand, and when that union has taken place there is only one single debt, and in order to redeem he must pay off both mortgages, each of which affects the entirety of both estates."

The old case of *Bovey* v. *Skipwith* (3) referred to by Turner L.J., was a combined case of tacking (in the strict technical sense) and consolidation. There was (1.) a mortgage (apparently) with conveyance of the legal estate on two properties; (2.) an assignment of the equity of redemption in the two properties to a second mortgagee; (3.) a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held, first, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgagee, and secondly, that having done so he might consolidate his third mortgage (which was on one estate only) with the first mortgage on both estates and hold the two

(1) 23 Beav. 341. (2) 1 Giff. 446; 2 D. & J. 611.
(3) 1 Ch. Ca. 201.

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estates as against the second mortgagee until all that was due to him on both securities should be satisfied.

The case of *Titley* v. *Davies* (1), before Lord Hardwicke, may be distinguished on the ground that Titley, the second equitable mortgagee of one of the estates, had before the assignment of the equity of redemption in another estate to Peyton, acquired a right to redeem Shepheard, the first mortgagee on both estates, and thereby consolidate the two mortgages. It is not, therefore, in my opinion, a direct authority on the present case, in which the consolidation has taken place by purchase and transfer, and not by the exercise of an existing right to redeem.

In *Selby* v. *Pomfret*, (1861) before Wood V.-C. (2), and before Campbell L.C. (3), the facts, so far as material for the present purpose, were: (1.) mortgage to defendants of leasehold premises in Mark Lane on June 26, 1858; (2.) mortgage to Stileman and Neale of leasehold premises in Herne Hill on February 1, 1859; (3.) mortgagor became bankrupt February 9, 1859; (4.) transfer of the Herne Hill mortgage to defendants February 16, 1859, and therefore after the bankruptcy of the mortgagor. The Vice-Chancellor held that the defendants were entitled to consolidate the two mortgages against the assignees in bankruptcy of the mortgagor, and to retain the balance due on the Mark Lane mortgage, which was deficient, out of the surplus proceeds of sale of the Herne Hill mortgage. Lord Campbell, in affirming the Vice-Chancellor's decree, said: "It does seem strange that mortgagees after the bankruptcy of the mortgagor should be allowed by their own act to vary the rights of themselves and the other creditors of the mortgagor, so as to obtain payment in full of a debt in respect of which, at the time of the bankruptcy, they were only entitled to a dividend along with the body of unsecured creditors. But it is settled that a mortgage executed by a bankrupt before his bankruptcy, where the value of the land mortgaged exceeds the sum secured, is upon the bankruptcy of the mortgagor, to be considered tabula in naufragio, and if the assignees do not immediately

(1) 2 Y. & C. Ch. 399. (2) 1 J. & H. 336.
(3) 3 D. F. & J. 595.

redeem, any mortgagee of the bankrupt whose security is insufficient, may take an assignment of the mortgage and tack to it the debt due under the mortgage to himself. Therefore the Vice-Chancellor truly observes, 'The fact of the bankruptcy before the defendants took the transfer made no difference. Any one might seize the plank. The assignees might have got the benefit of it if they had been quick enough; but the defendants were more alert.'" And see *Neve* v. *Pennell.* (1)

Although the Lord Chancellor uses the word "tack," it is apparent from the facts of the case which he was dealing with that he meant tacking in the sense of consolidation. The case of *Selby* v. *Pomfret* (2) may, no doubt, be distinguished from the present one on the ground that the assignment of the equity of redemption was by operation of law, but if there was no existing right of consolidation at the date of the bankruptcy, the distinction seems to me unsubstantial, because the assignees of the bankrupt take his property subject only to existing equities. The statutory jus tertii of the creditors may be considered as entitled to more consideration and not less than the right of a particular assignee.

In *Beevor* v. *Luck* (1867) (3) Wood V.-C. held that a mortgagee of one property might, as against the assignee of the equity of redemption of another property, consolidate with his mortgage a mortgage from the same mortgagor on that other property of which he had taken a transfer after the date of the assignment of the equity of redemption of the second property only, overruling the case of *White* v. *Hillacre.* (4)

The extent to which the right of consolidation was carried in this case was criticised by Lord Selborne in this House in *Jennings* v. *Jordan* (5), and so far as it held that mortgages on two properties could be consolidated against the assignee of the equity of redemption of one property only, where the union of the two mortgages did not take place until after the separation of the equities of redemption, the case of *Beevor* v. *Luck* (3) must

(1) 2 H. & M. 170.
(2) 1 J. & H. 336; 3 D. F. & J. 595.
(3) L. R. 4 Eq. 537.
(4) 3 Y. & C. Ex. 597.
(5) 6 App. Cas. 698.

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be held to be overruled. It was so considered by Fry J. in *Harter* v. *Colman*. (1)

This case is free from any such difficulty. At the time when redemption is sought, all the mortgages are presently redeemable by the same person. Pledge, the plaintiff in the action, became by one transaction the assignee of the entire equity of redemption of all the mortgages. An attentive consideration of Lord Selborne's judgment has satisfied me that the noble and learned Lord did not intend to throw any doubt upon the application of the doctrine in such circumstances.

The actual point decided in *Jennings* v. *Jordan* (2) was, that a mortgagee could not as against the assignee of an equity of redemption of one property consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption. The contrary had been maintained by the defendant on what was probably a misunderstanding of the case of *Tassell* v. *Smith*. (3) "I take it," said Lord Blackburn, "that the only question before this House is, whether where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is as against the purchaser an equity to consolidate the two." Their Lordships also discussed the question whether in a case where the equities of redemption have become separated, consolidation could take place against the assignee of one equity of redemption only by subsequent union of two mortgages, and they preferred the decision in *White* v. *Hillacre* (4) to that of Wood V.-C. in *Beevor* v. *Luck*. (5)

Lord Selborne expressed himself in the following words: "A mortgagee who holds several distinct mortgages under the same mortgagor, redeemable not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may, within certain limits and against certain persons (entitled to redeem all or some of them)

(1) 19 Ch. D. 630.
(2) 6 App. Cas. 698.
(3) 2 D. & J. 713.
(4) 3 Y. & C. Ex. 597.
(5) L. R. 4 Eq. 537.

consolidate them—that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all. This doctrine of consolidation is well established and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application when all the mortgages, whether originally made to the same mortgagee or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which after that state of things has once existed the equities of redemption have become separated by the act of the person in whom they had been combined, though it may perhaps be open to objection on some practical grounds, rests upon an intelligible principle."

After discussing the principle on which such an extension can be defended, Lord Selborne continues: "In the present case the rights of redemption existing at the date of the settlement of 1838 could not, in my opinion, have been properly worked out (unless by some voluntary arrangement between the parties interested) otherwise than by consolidating all the mortgages now vested in the appellant Jennings which were prior in their creation to December 3, 1838, as they have been, in fact, consolidated by the decree of the Court of Appeal." The date mentioned by Lord Selborne, I may observe, was the date on which the assignment of the equity of redemption was made to the appellant's predecessor in that case. "I have much more difficulty in following or satisfactorily explaining the principle of some other authorities (such as *Beevor* v. *Luck* (1)) which have held (contrary to the decision of Baron Alderson in *White* v. *Hillacre* (2)) that a mortgagee's right to consolidate as against the purchaser of the equity of redemption of property mortgaged to him is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages which were then in other hands, and with the equity of redemption of which (if there were no consolidation) the purchaser would have nothing to do."

I understand Lord Selborne to be here speaking only of the

(1) L. R. 4 Eq. 537. (2) 3 Y. & C. Ex. 597.

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case in which the equities of redemption have become separated, and his observations have no reference to a case such as that now before the House, in which all the equities of redemption have been assigned to, and are now vested in, one person. I do not think that anything was said in this House in *Jennings* v. *Jordan* (1) which throws any doubt or discredit on the decision in *Vint* v. *Padget* (2) and the other cases to the same effect. At the time when this action was commenced the exact position contemplated by Lord Selborne had taken place—of all the mortgages being united in a single hand and redeemable by the same person.

It appears to me, my Lords, that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of the mortgages, subject to which he has purchased, although it may be unreasonable to hold that he can be affected by the transfer to such holders of mortgages to other persons by the same mortgagor on property which he has not purchased, and with the equity of redemption of which he has no concern. He does not investigate the title to such other property and cannot know in the latter case to what mortgages the property is subject. If your Lordships affirm the decree now under appeal, the doctrine of consolidation will be confined within at least intelligible limits. It will be applicable where at the date when redemption is sought all the mortgages are united in one hand and redeemable by the same person, or where after that state of things has once existed the equities of redemption have become separated. If the purchaser of two or more equities of redemption desires to prevent consolidation, he has it in his power to redeem any one mortgage before consolidation takes place; but if for his own convenience he delays

(1) 6 App. Cas. 698. (2) 1 Giff. 446; 2 D. & J. 611.

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doing so, he runs the same risk as his assignor ran of the mortgages becoming united by transfer in one hand.

I am of opinion that the application of the doctrine of consolidation to a case like the present has been too long considered part of the equitable jurisprudence of this country to be altered at the present time, and it is not so unreasonable as to demand a reversal of it by this House.

I move, therefore, that this appeal be dismissed with costs.

Order of the Court of Appeal and judgment of Romer J. affirmed and appeal dismissed with costs.

Lords' Journals, March 26, 1896.

Solicitors for appellant: *A. R. & H. Steele, for John Minter, Folkestone.*

Solicitors for respondents: *Talbot & Tasker.*

[HOUSE OF LORDS.]

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FRANK REDDAWAY AND FRANK REDDAWAY & CO., LIMITED . . . } APPELLANTS;

AND

GEORGE BANHAM AND GEORGE BANHAM & CO., LIMITED . . . . } RESPONDENTS.

Trade Name—Common Law Right—Name indicating Manufacturer—True Description of Article sold—Imitation—Tendency to Deceive—Fraud.

A trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers (whether immediate or ultimate) into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods.

The plaintiff had for some years made belting and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting and nothing else. The defendant began to sell belting made of the yarn of camel's hair, and stamped it "Camel Hair Belting" so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavouring thus to pass off his goods as the plaintiff's.

Held, that the plaintiff was entitled to an injunction restraining the

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defendant from using the words "camel hair" as descriptive of or in connexion with belting made or sold or offered for sale by him and not manufactured by the plaintiff without clearly distinguishing such belting from the plaintiff's belting.

The decision of the Court of Appeal ([1895] 1 Q. B. 286) reversed.

THE following statement of the facts is taken from the judgment of Lord Herschell :—

The appellant, Frank Reddaway, has been for many years a manufacturer of machine belting. In October 1892 the company, the other appellants, was incorporated; and the business has since been carried on by it. In 1877 Reddaway began to make belting from yarn, which consisted principally of wool or hair, and sold it under the name of "Woollen Belting." About the year 1879 he began to call the belting which he manufactured "Camel Hair Belting," for the purpose of distinguishing it from the belting of other manufacturers. A large proportion of his trade has been with India, the Colonies, and foreign countries. The belting consigned to these countries was stamped with a "Camel," or with the word "Camel," or "Camel Hair," and sometimes with both.

The yarn of which the appellant's belting chiefly consists is, for the most part, made of camel hair. I gather from the evidence that, although the wool or hair of which the yarn was made was commonly called "camel hair," it was not generally known (at all events until recently) that it really consisted of the hair of the camel.

The respondent, Banham, was formerly in the employment of the appellant Reddaway. He ceased to be so employed in 1889, and began to manufacture belting on his own account. He made belting from yarn of the same description as that used by the appellants, which he sold and advertised as Arabian belting. The respondent company was formed in 1891, and in April or May of that year began to call their belting "Camel Hair Belting," those words, and those words only, being in most cases stamped on the belting. Many other manufacturers had made, for many years past, belting, the principal ingredient of which was camel hair yarn, and which they sold and described by such names as yak, buffalo, llama, crocodile, &c.

The appellants having learned that the respondents were selling belting described as "Camel Hair Belting," and with those words stamped upon it, brought this action for an injunction, which was tried at Manchester before Collins J. and a special jury. The learned judge directed the jury that if the plaintiff had succeeded in so identifying his name with those words as that on the market "Camel Hair Belting" would mean Reddaway's belting, and if the defendant so described his particular belting as to be likely to deceive purchasers, it would not matter in point of law for the decision of this case whether he intended to deceive purchasers by so doing or not. The questions left by the learned judge to the jury, with their answers, were as follows:—

Q. 1. Does "Camel Hair Belting" mean belting made by the plaintiffs, as distinguished from belting made by other manufacturers? *A.* Yes.—*Q.* 2. Or does it mean belting of a particular kind without reference to any particular maker? *A.* No.—*Q.* 3. Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting, as and for the belting of the plaintiffs? *A.* Yes.—*Q.* 4. Did the defendants endeavour to pass off their goods, as and for the goods of the plaintiffs, so as to be likely to deceive purchasers? *A.* Yes.

The learned judge considered the first three questions only to be necessary, but added the fourth question at the instance of the counsel for the plaintiffs.

Upon the findings of the jury Collins J. entered judgment for the plaintiffs with costs; and he granted an injunction restraining the defendants from continuing to use the words "Camel Hair" in such a manner as to deceive purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture.

Upon an application to set aside the verdict, judgment and injunction and enter judgment for the defendants, on the ground that there was no evidence to support the verdict, and that the judge ought to have entered judgment for the defendants upon the findings of the jury, or for a new trial on the grounds of

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misdirection, and that the verdict was against the weight of evidence, the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.) reversed the decision of Collins J., and entered judgment for the defendants with costs. (1) Against this decision the plaintiffs brought this appeal.

Feb. 18, 20, 21, 24. *Asquith Q.C.* and *Moulton Q.C.* (*J. C. Graham* with them) for the appellants. The principle applicable to cases of this class is stated by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (2), that a man has no right to put off his goods for sale as the goods of a rival trader, and cannot therefore be allowed to use names or marks by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person. There is no exception in the case of a name which is verbally and in its primary meaning a true description of the goods, but which has acquired the meaning in the trade that the goods are those of a particular maker, so that purchasers ask for them exclusively by that name and buy them in the belief that they are getting that trader's goods. The Court of Appeal treated this case as an exception to the general rule because the defendants in using the name "camel hair belting" only told "the simple truth." But there is no exception to the rule: it is, as Turner L.J. said in *Burgess* v. *Burgess* (3), a question of evidence in each case whether there is false representation. The defendants' belting was no doubt made of the yarn of camel's hair, and in one sense "camel hair belting" was a true description of it, but the jury found that "camel hair belting" meant to purchasers Reddaway's belting only, and that the defendants so described their belting as to mislead purchasers into the belief that they were buying Reddaway's. They also found that the defendants intended to deceive purchasers, though this was not necessary for the decision. "The simple truth" therefore in this as in many other instances covered a false representation. It was in appearance only, not in fact, the simple truth. The governing principle is stated or illustrated

(1) [1895] 1 Q. B. 286. (2) 11 H. L. C. at p. 538.
(3) 3 D. M. & G. 896.

in several cases: e.g. *Croft* v. *Day* (1); *Cheavin* v. *Walker* (2); *Massam* v. *Thorley's Cattle Food Co.* (3); *Singer Manufacturing Co.* v. *Loog* (4); *Montgomery* v. *Thompson* (5); and *Wotherspoon* v. *Currie* (6), where "Glenfield starch" had acquired a secondary meaning. There Lord Westbury (7) inaccurately spoke of the name as "the property of the appellants." It is not a question of property; outside the Trade Marks Acts no man has the exclusive right to a name; the right is not to a name, but to protection from having another man's goods passed off as his goods. The cases relied on in the Court of Appeal do not support the judgment. The decision in *Turton* v. *Turton* (8) was manifestly right but has no application here. *Young* v. *Macrae* (9) was the case of a patent, and the name indicated the thing, not the maker. That the findings of the jury were justified is shewn by the correspondence and the oral evidence. The questions for the jury were framed upon what was said in *Reddaway* v. *Bentham Hemp Spinning Co.* (10)

Bigham Q.C. and *J. K. F. Cleave* (*McCall Q.C.* with them) for the respondents. The plaintiffs have tried to fix a secondary meaning on a plain English expression composed of ordinary words, and seek to prevent the whole world from using that expression without some distinguishing words. There is no authority for such a contention: authority is the other way. There is an inherent right to describe one's goods in plain terms which are a true description, and not the less so because other people have used the same description: *Burgess* v. *Burgess* (11); per Knight Bruce L.J. A man cannot take out a patent for a natural substance: *Young* v. *Macrae* (9); and the plaintiffs cannot claim the exclusive use of a truthful description such as "camel hair belting." The defendants do no wrongful act but are only exercising their natural rights in using a true description and are not to be restrained because some of the public may make mistakes: *Turton* v. *Turton* (8);

(1) 7 Beav. 84.
(2) 5 Ch. D. 850.
(3) 14 Ch. D. 748.
(4) 8 App. Cas. 15.
(5) [1891] A. C. 217.
(6) L. R. 5 H. L. 508, 521.
(7) L. R. 5 H. L. 522.
(8) 42 Ch. D. 128.
(9) 9 Jur. (N.S.) 322.
(10) [1892] 2 Q. B. 639.
(11) 3 D. M. & G. 896.

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In re Leonard & Ellis's Trade Mark. (1) There is an obvious distinction between a mere description such as "Stone Ale" and a definition per genus et differentiam, such as "camel hair belting." There was no imitation of the plaintiffs' labels or marks. The evidence did not support the findings: there was no evidence of fraud, and fraud is essential to the plaintiffs' case. The fourth finding does not charge fraud; nor did the statement of claim.

The House took time for consideration.

March 26. LORD HALSBURY L.C. My Lords, I believe in this case that the question turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult when examining former decisions to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else.

How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow.

In this case the words "camel hair belting" suggest such a difficulty of proof. If I had been sitting as a juryman in this case I confess (but for a circumstance I am about to mention) I should have had great difficulty in acquiescing in the contention that a person was making his goods pass as the goods of somebody else by simply describing the subject of sale by these words. It is partly made or substantially made of camel hair, and it is belting. To me or to other persons not familiar with the trade this undoubtedly does seem simply a description of

(1) 26 Ch. D. 288.

the article sold, and not a representation of its being made by a particular manufacturer. But then I should not know, what persons engaged in the trade would know, how far particular words, even though descriptive of the article sold, may have acquired a kind of technical signification which would give to them in the trade as completely the character of being made by a particular manufacturer as if they were stamped with his trade-mark.

The circumstance to which I referred is to be found in the letter of June 12, 1891. The writer, who doubtless knew what he was doing, specially desires that the thing which he is ordering should bear no other stamp than "Camel Hair Belting," and if he gets that he adds "I think I can take this order from Reddaways."

My Lords, I think with this letter before them the jury were perfectly right, and that my primâ facie impression from the words being only descriptive of the article sold would have been wrong. The result is, in my mind, that the proof is satisfactory, and that one man's goods are being sold as if they were the goods of the other.

My Lords, reliance appears to have been placed in the Court of Appeal on what was supposed to be decided in *Burgess* v. *Burgess* (1) by Knight Bruce L.J. and Sir George Turner, and I think it is necessary to examine the decision in *Burgess* v. *Burgess* (1) to see what it really did decide and the facts upon which that decision was based. Kindersley V.-C. had by an injunction restrained the defendant from continuing to use the words "Late of 107 Strand" where he had been employed by his father, and from continuing on the sides of his shop door a plate with the words "Burgess's Fish Sauce Warehouse late of 107 Strand." The defendant Burgess had for many years been in the employment of his father in the trade of an Italian and fish sauce warehouseman, and had shortly before the application for the injunction set up in King William Street a similar business, placing the words which the Vice-Chancellor restrained the use of on his shop door and the sides of his house. An appeal was brought against the refusal of the Vice-Chancellor

(1) 3 D. M. & G. 896.

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to go further and to prohibit the use of the words "Burgess's Essence of Anchovies" in any bill-head, invoice or advertisement.

The refusal of Knight Bruce L.J. to interfere with what the Vice-Chancellor had determined is stated by himself to be grounded on the fact that the defendant carried on business under his own name, and "sells his essence of anchovies," which appears to be assumed to be a known article, "as Burgess's Essence of Anchovies which in truth it is." The whole ground of complaint," says Knight Bruce L.J. "is the great celebrity which during many years has been possessed by the elder Mr. Burgess's Essence of Anchovies." Again, be it observed, treating the words "Essence of Anchovies" as describing a known article not peculiar to any one manufacturer. "That" (continues the learned judge) "does not give him such exclusive right, such a monopoly, such a privilege as to prevent any man from making essence of anchovies and selling it under his own name."

And Turner L.J. I think most accurately says: "It is a question of evidence in each case whether there is false representation or not. Looking at the labels before us, I think it is clear that, since the order made by the Vice-Chancellor, there has been no representation made on the part of the defendant that the goods which he is selling are the goods manufactured by the plaintiff."

My Lords, I have only to add to that, that even then the learned judges did not conclude the question, for dealing with an interlocutory injunction, as they were, they left the plaintiff, if he thought proper, to try his action at law, and make out, if he could, that there was the false representation, which, if made, would give a ground of action. But it is most important to observe the hypothesis of fact upon which that judgment proceeds, and if the facts, such as they have been established in this case, could have been made out, I cannot understand that there is any principle of law laid down which would have prevented an injunction, although the defendant's name was "Burgess" and although the article was described by a descriptive name, which however had not as matter of fact in that

case, in the view of the judges, the technical signification of being only made by Burgess the father.

My Lords, it seems to me therefore that there is nothing in that decision, or indeed in any other, which interferes with the propriety of an injunction where the proposition of fact with which I have started can be established, and it is to be observed that whatever the form of the injunction if the principle of it is duly observed it is only such a form as prevents the mischief pointed to. It would be impossible, for instance, to say that a trader could not describe his goods truly by enumerating the particulars of what they consisted, unless such description was calculated to deceive and make his goods pass as the goods of another. What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade, and the peculiarities of each trade. It would be very rash a priori to say how far a thing might or might not be described, without being familiar with the technology of the trade.

My Lords, for these reasons I move that the judgment of the Court of Appeal be reversed, and that the respondents do pay to the appellants the costs both here and below.

LORD HERSCHELL [after stating the facts set forth above:—] My Lords, in the opinion of the Court of Appeal inasmuch as the words "camel hair belting" were descriptive of the article sold, the words "camel hair" indicating the material of which it was made, the defendants were entitled to use the same language with reference to the belting which they sold; and the plaintiffs could have no right to restrain them from doing so even though, as the jury had found, the words "camel hair belting" would be understood to mean belting manufactured by the plaintiffs, and purchasers of the belting would be deceived into the belief that they were obtaining goods of the plaintiffs' manufacture.

The Master of the Rolls expressed the view that a manufacturer might obtain the right to prevent a person using a name, which would be understood as his, and the use of which would thus interfere with his trade, but that, though this was the

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fundamental proposition, you could not restrain a man from telling the simple truth; and that this was all the defendants had done when they called their belting "Camel Hair Belting."

It must be taken, if the findings of the jury are to stand, on which I shall have a word or two to say presently, that the description by the defendants of their belting as "camel hair belting" would deceive purchasers into the belief that they were getting something which they were not getting, namely, belting made by Reddaway. If they would be thus deceived by the defendants' statement there must surely be some fallacy in saying that they have told the simple truth. I will state presently where I think the fallacy lurks. Before I do so, however, it is right that I should say that there appears to me abundant evidence to support the findings of the jury.

For many years belting made of camel hair yarn had been known in the markets of the world. It had been sold under a variety of names. But there was ample evidence to justify the finding, that amongst those who were the purchasers of such goods, the words "camel hair" were not applied to belting made of that material in general; that, in short, it did not mean in the market belting made of a particular material, but belting made by a particular manufacturer. It is impossible, I think, to read the correspondence which passed between the defendants, and those who were ordering goods of, or procuring orders for them, without seeing that this was the case. Moreover, it it impossible to doubt that the defendants were well aware of the fact.

They begin by calling their belting "Arabian," and state that they are prepared to guarantee it "to be better than the belting commonly called 'camel hair belting.'" They are told by one of their correspondents that if he has a sample similar to one he forwards (which was made by Reddaway) "stamped camel hair belting, nothing more," he thinks he can take this order from Reddaways. They do their best to comply with their correspondent's wish, and send belting so stamped. Another correspondent asks for 500 feet, which is to be quite equal to Reddaway's "camel hair belting," and which must be

in every respect identical to the sample of that make. It was to be stamped "warranted best camel hair belting." In that or another case, it is not quite clear which, the defendants stated to the firm whom they employed to manufacture the belting, that no manufacturer's name must appear on it, or it would be useless. I see no reason to be otherwise than completely satisfied with the answers which the jury gave. On this assumption I proceed to inquire whether the plaintiffs have made out any right to relief.

I cannot help saying that, if the defendants are entitled to lead purchasers to believe that they are getting the plaintiffs' manufacture when they are not, and thus to cheat the plaintiffs of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality. I do not think your Lordships are driven to any such conclusion.

The principle which is applicable to this class of cases was, in my judgment, well laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1) It had been previously enunciated in much the same way by Lord Langdale in the case of *Croft* v. *Day*. (2) Lord Kingsdown's words were as follows: "The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord Langdale, in the case of *Perry* v. *Truefitt* (3)), be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." It is, in my opinion, this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade mark, or in any other way. The word "property" has been sometimes applied to what has been termed a trade mark at common law. I doubt myself whether it is accurate to speak of there being property in such a trade mark, though, no doubt some of the rights which are

(1) 11 H. L. C. 538.
(2) 7 Beav. 84.
(3) 6 Beav. 66.

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incident to property may attach to it. Where the trade mark is a word or device never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade mark of one manufacturer had been thus appropriated by another, would be enough to bring the case within the rule as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade mark thus identified with a particular manufactory the rights of the person whose trade mark it was, would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival which are not of this simple character—cases where the mere use of the particular mark or device which had been employed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer.

The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this I think he would, on well-established principles, be entitled to an injunction.

In my opinion, the doctrine on which the judgment of the

Court of Appeal was based, that where a manufacturer has used as his trade-mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark, is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival.

The authority relied on was the case of *Burgess* v. *Burgess*. (1) When the judgments in that case are examined, it seems to me clear that no such point was decided. Turner L.J. commences by saying, "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." He then points out that where a person is selling goods under a particular name, and a person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. He adds: "It is a question of evidence in each case whether there is false representation or not." This, I think, clearly recognises that a man may so use even his own name in connection with the sale of goods as to make a false representation. In *Massam* v. *Thorley's Cattle Food Co.* (2), James L.J. said: "*Burgess* v. *Burgess* (1) has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article whatever may be the consequences of it, or whatever may be the motive for doing it, or whatever may be the result of it." After quoting from the judgment of Turner L.J. the passages to which I have just alluded, he said: "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in

(1) 3 D. M. & G. 896. (2) 14 Ch. D. 748.

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Wotherspoon v. *Currie* (1), in which the House of Lords differed from the view which I had taken." The decision in *Wotherspoon* v. *Currie* (1) is an important one, and is, in my judgment, inconsistent with the ratio decidendi of the Court of Appeal in the present case. The name "Glenfield" had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it primâ facie means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as "camel hair" is descriptive of the material of which the plaintiff's belting is made. Lord Westbury pointed out that the term "Glenfield" had acquired in the trade a secondary signification different from its primary one, that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff. In *Massam* v. *Thorley's Cattle Food Co.* (2), just referred to, James L.J. said: "The defendant was actually manufacturing starch at Glenfield, having gone thither for the purpose of enabling him to say that he was manufacturing it at Glenfield. The House of Lords said the mere fact that he was really carrying on his manufacture at Glenfield, and was not therefore telling a lie, did not exempt him from the consequence of the fact that his proceedings were intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the plaintiffs."

I think this view of the decision of the House of Lords was correct, and that it is at variance with the view taken by the Court of Appeal, that the defendants could not be liable to an action because in using the words "camel hair" in connection with their belting they were simply telling the truth. I rather demur, however, to the statement of James L.J., that the defendant in *Wotherspoon* v. *Currie* (1) was not telling a lie in calling his starch "Glenfield starch," as I do to the view that the defendants in this case were telling the simple truth when they sold their belting as camel hair belting. I think the

(1) L. R. 5 H. L. 508. (2) 14 Ch. D. 748.

fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and who knows and intends this to be the case, is surely not to be absolved from a charge of falsehood because in another sense which will not be conveyed and is not intended to be conveyed it is true. In the present case the jury have found, and in my opinion there was ample evidence to justify it, that the words "camel hair" had in the trade acquired a secondary signification in connection with belting, that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the plaintiffs. They have found that the effect of using the words in the manner in which they were used by the defendants would be to lead purchasers to believe that they were obtaining goods manufactured by the plaintiffs, and thus both to deceive them and to injure the plaintiffs. On authority as well as on principle, I think the plaintiffs are on these facts entitled to relief.

The case of *Massam* v. *Thorley's Cattle Food Co.* (1), from the judgment of James L.J. in which I have already made quotations, is an authority in favour of the plaintiffs' contention. It was argued for the respondents that in that case there was fraud, inasmuch as Thorley, whose name formed part of the designation of the company, had only a small, indeed it may be said a nominal, interest in it. I do not think this was the foundation of the judgment; the reasoning of James L.J. would have been equally forcible if Thorley's interest had been the principal one. The company had quite as much right to call themselves by the name they adopted as by any other. What they were restrained from doing was endeavouring to pass off their goods as the goods of another manufacturer. This was the wrongful act which brought them within the

(1) 14 Ch. D. 748.

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reach of the law, and not the particular means by which they carried out their design. Besides the cases which I have referred to, there are other authorities which support the appellants' case. I need only mention one—the case of *Montgomery* v. *Thompson* (1) in your Lordships' House. It was said in the Court below that the judgment there proceeded on the ground that the defendant had acted fraudulently. But the only fraud consisted in doing acts designed to cause persons to purchase his goods as and for the plaintiffs'. The acts commented on were only the means devised to accomplish that end. On the findings of the jury, I think precisely the same kind of fraud is present in the case under appeal. I ought, perhaps, to notice the case of *Turton* v. *Turton* (2), which was said to be an authority in the respondents' favour. That case was, I think, an entirely different one. There was no proof that the defendants were passing off their goods as those of the plaintiffs, the utmost that was shewn was that similarity (there was not identity) in the name of the firms might lead incautious persons to make mistakes. Reliance was placed for the respondents upon the decision of Wood V.C. in *Young* v. *Macrae* (3), and in the Court of Appeal Rigby L.J. regarded it as adverse to the plaintiff's contention. When carefully examined I do not think it is so. Where a patentee attaches a particular name to the production he patents, that name becomes common property as descriptive of the patented article. It possesses, indeed, no other name. That name would necessarily be applied to it by all persons desiring to purchase the article. It is not descriptive of the production of a particular manufacturer, but of the article itself, by whomsoever it is manufactured. Indeed, there is no presumption that the patentee will manufacture it, even during the term of the patent; more often than not patented articles are manufactured by other persons by the licence of the patentee.

What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade-mark? I answer he has no

(1) [1891] A. C. 217. (2) 42 Ch. D. 128.
(3) 9 Jur. (N.S.) 322.

such right; but he has a right to insist that it shall not be used without explanation or qualification if such a use would be an instrument of fraud. Who suffer injury by such a conclusion, or would be the worse if the defendant is thus restrained? It has been shewn that the public have not needed the words "camel hair" to describe a particular kind of belting, that the words have never been used in the trade in that sense. What James L.J. said in *Thorley's Case* (1) is applicable to the present. He observed: "Thorley's Food for Cattle had never become an article of commerce as distinguished from the particular manufactory from which it had proceeded."

It is not proposed, in the present case, to prohibit the use of the words "camel hair" altogether. The injunction granted by Collins J. had not that effect. In the case just referred to the counsel for the plaintiff, at the conclusion of the judgment, asked whether the substance of their Lordship's judgment was not that the defendants were not to use the name Thorley in connection with their cattle food. James L.J. replied, "We cannot prohibit them using the name if they use it in a way not calculated to mislead the public." I say the same about the use of the words "camel hair" in the present case.

For these reasons I think the judgment of the Court of Appeal should be reversed.

LORD MACNAGHTEN. My Lords, in this case your Lordships are not asked, at least by the appellants, to lay down any new law. The appellants are content to rely upon the old and familiar doctrines of the Court which have been repeated over and over again. "I have often endeavoured," said James L.J. in a well-known trade-mark case (*Singer Manufacturing Co.* v. *Loog* (2)), in which there was no claim to a registered mark—"I have often endeavoured to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it) that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means whereby, without

(1) 14 Ch. D. 748.

(2) 18 Ch. D. at p. 412.

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making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade designation, I am of opinion that there is no such thing as a monopoly, or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods, always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law."

My Lords, I have cited this passage because it seems to me to state clearly the principle on which Mr. Reddaway and his associates are entitled to relief against Mr. Banham and the company of which he is managing director. The substance of Reddaway's complaint, as I understand it, is that Mr. Banham is putting his goods on the market under a designation which enables purchasers from him to make a false representation to their customers. It is immaterial that the designation in question, taken by itself, would convey to a person not conversant with the trade information which cannot be called untrue if by means of that designation Mr. Banham does make, not perhaps directly, but certainly through the medium of other persons, a false representation that his goods are the goods of Reddaway.

Reddaway and Banham—I use those names for shortness—are both manufacturers of hair belting, a kind of belting which is much used for driving machinery. This article has a large sale at home and abroad. In countries where the heat is great and the air very dry it is preferable to leather. Hair belting, whoever the maker of it may be, is generally composed, more or less, of stuff imported into England and sold in the English market as "camel hair." Until recently nobody seems to have imagined that the camel hair of commerce was true to name. It was believed to be a mixture of hair—hair of sheep and goats, and various Eastern animals—in which the hair of the camel might be found, but which did not even pretend to be

really camel's hair. Indeed, so little importance was attached to its nominal connection with the camel that, until it acquired some celebrity through Reddaway's manufacture, the yarn made from it used to be sold in the market simply as brown worsted.

It seems to have been the fashion for manufacturers of hair belting to distinguish their goods by the name of some chosen animal, hairy or hairless. There was, for example, buffalo belting, there was yak belting, and crocodile belting. Reddaway, unfortunately for him, as it has turned out, selected the camel as his emblem. He called his belting camel hair belting. Owing to the excellence of his manufacture his belting became widely known all over the world. It was advertised as camel hair belting. It was ordered, sold and invoiced as such; and so camel hair belting came to mean Reddaway's belting, and nothing else. It was admitted at the trial that for about fourteen years no belting had been made or sold under the description of camel hair or camel hair belting except by Reddaway and certain persons whom he had promptly challenged and stopped. Indeed, so long as the expression "camel hair belting" was taken to be a fanciful designation, Reddaway had no difficulty in holding the field against any interloper who hoped to find more profit and less trouble in trading on another man's reputation than on his own merits.

Banham was for two years in the employment of Reddaway at his works. In 1889 he set up for himself, and began to make hair belting. Like others in the trade he used more or less the camel hair of commerce. At first he called his belting "Arabian belting." Then he began cautiously and tentatively to offer his goods as camel hair belting. After 1891 when he turned his business into a limited company his proceedings were marked with less caution; at last they attracted Reddaway's attention, and then the present action was brought.

The action was launched on the footing that the expression camel hair belting was a fanciful term. But in the course of the trial it was proved, partly by the evidence of experts and partly by an exhibit collected from a living animal in the Zoological Gardens at Manchester, that the camel hair of commerce, of which many bundles were produced, was really

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and truly for the most part composed of genuine camel's hair. This evidence seems to have come as a revelation to Reddaway and his advisers. However they accepted the situation, and forebore to contest the point further. And so it was established that Reddaway's trade designation, instead of being, as everybody supposed, a fanciful term, was nothing more or less than a substantially accurate description of the material of which his belting was composed. Now the Court of Appeal treat this discovery as the end of the whole matter. They hold that on this one fact being established Banham became entitled to put his goods on the market as camel hair belting without any qualification whatever. Anybody and everybody who wants to get a footing in the connection which Reddaway has formed is now free, if the Court of Appeal is right, to use Reddaway's password. The appellants concede—they cannot indeed any longer dispute—that everybody who makes belting of camel hair is entitled to describe his belting as camel hair belting provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under colour of imparting accurate and possibly interesting information. Practically the only difference which the unexpected turn in the evidence has made is this: the case now comes more properly under the second branch of the proposition laid down by James L.J.: if camel hair belting had kept its place as a fanciful term it would have fallen under the first.

The learned counsel for the respondents maintained that the expression "camel hair belting" used by Banham was the "simple truth." Their proposition was that "where a man is simply telling the truth as to the way in which his goods are made, or as to the materials of which they are composed, he cannot be held liable for mistakes which the public may make." That seems to me to be rather begging the question. Can it be said that the description "camel hair belting" as used by Banham is the simple truth? I will not call it an abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two

things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth.

I have now dealt with the only peculiarity in the case. For the rest the action is one of a very ordinary type.

In a trial which lasted three days, after a summing up which seems to me to be admirably concise and clear, a special jury of the county of Lancaster found that "camel hair belting" means belting made by Reddaway, and that it does not mean belting of a particular kind without reference to any particular maker. They also found that the defendants, that is Banham and the company with which he is connected, describe their belting so as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs.

There was another finding, not necessary for the relief asked, on which I desire to say a few words. It is stated in the judgment of the Master of the Rolls that the learned counsel for the plaintiffs at the trial did not appear to have asked the judge to leave to the jury the question whether the defendants had done anything fraudulently. "Indeed," his Lordship adds, "no such question seems to have been raised by the pleadings." If your Lordships turn to the pleadings, you will observe that the question was raised directly. It is quite true that the word "fraud" is not to be found in the statement of claim. But the whole gist of the action was that the defendants were endeavouring to palm off their goods as the goods of the plaintiffs by selling them under a designation which would enable purchasers from them in this country to deceive customers abroad. That is, as it seems to me, a charge of dishonesty, and I must say I think the charge was established. It was proved by admissions wrung from Mr. Banham on cross-examination, and by the correspondence which was put in evidence. When a manufacturer's

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goods are a drug on the market so long as they bear his own name or proclaim their true origin, and yet are saleable at once if marked with nothing but some common English words, and when that manufacturer holds himself out as ready and willing so to mark his goods, and does so mark them at the "instigation," as he says, of a purchaser, a Lancashire jury may perhaps be trusted to read the riddle. The jury found, and in my opinion rightly found, that the defendants endeavoured to pass off their goods as and for the goods of the plaintiffs.

Cases of this sort must depend upon their particular circumstances. The facts of one case are little or no guide to the determination of another. I do not, therefore, propose to trouble your Lordships with any reference to authorities except those relied on in the judgment of the Court of Appeal. The judgment of Turner L.J. in *Burgess* v. *Burgess* (1), though eclipsed, as it has been said, in public favour by the brilliancy and point of his colleague's language, is an accurate and masterly summary of the law. But it seems to me to be an authority in favour of Reddaway, and not in favour of Banham. I am quite at a loss to know why *Turton* v. *Turton* (2) was ever reported. The plaintiff's case there was extravagant and absurd. With regard to the case of *Young* v. *Macrae* (3), which is referred to at some length, it must be remembered that it was a judgment on an interlocutory application, and that the Vice-Chancellor reserved the question for the hearing, with an intimation that it would then deserve serious consideration. It does not seem to me to have any bearing upon the present case, and I only notice it to observe that whenever it is quoted the Vice-Chancellor's comments upon his own decision ought not to be lost sight of. "I had to consider this question," said the Vice-Chancellor on a later occasion (*Braham* v. *Bustard* (4)), "in the case of Young's Paraffin Oil; and in that case if the evidence had gone to shew that the plaintiff had been the first to apply the name paraffin to the oil, I should have granted an injunction, but there I had it proved that the name paraffin oil had long been known as the scientific name of the article,

(1) 3 D. M. & G. 896.
(2) 42 Ch. D. 128.
(3) 9 Jur. (N.S.) 322.
(4) 1 H. & M. 447.

and that the defendant could not well have called it anything else." Lastly the case of *Montgomery* v. *Thompson* (1) was cited, but only for the purpose of putting it aside, I am sure I do not know why. That was a gross case, no doubt. But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court. In principle and in substance I can see no difference between the present case and *Montgomery* v. *Thompson*. (1)

In the result, I am of opinion that the appeal must be allowed. As regards the form of the injunction, I should be disposed to say that in all cases where the defendant is to be restrained from using unfairly words or marks which he is at liberty to use provided only they are used fairly, it would be better that the injunction should go in the form approved by this House in *Johnston* v. *Orr-Ewing*. (2)

LORD MORRIS. My Lords, I have felt some difficulty in concurring as I do in the judgment proposed to be given in favour of the appellants by your Lordships, for it establishes, and in my opinion for the first time, the proposition that a trader is not permitted to merely tell truthfully and accurately the material of which his goods are made. I find myself coerced, however, to a conclusion against the respondents by the finding of the jury, which amounts to this, "that camel hair belting had become so identified with the name of the appellants Reddaway as that camel hair belting had in the market obtained the meaning of Reddaway's belting"; and there was sufficient evidence given at the trial to support that finding of the jury. That finding establishes as a fact that the use of the words "camel hair belting" simpliciter deceives purchasers, and it becomes necessary for the respondents to remove that false impression so made on the public. That, to my mind, is obviously done when the respondents put promi-

(1) [1891] A. C. 217. (2) 7 App. Cas. 219.

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nently and in a conspicuous place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own. A representation deceiving the public is and must be the foundation of the appellants' right to recover; they are not entitled to any monopoly of the name "camel hair belting" irrespective of its deceiving the public, and every one has a right to describe truly his article by that name, provided he distinguishes it from the appellants' make. In this case, the respondents did not so distinguish it because they omitted to state that it was their own make. Consequently I concur in the motion which has been made.

Order appealed from reversed, with costs here and below: Declared that judgment ought to be entered for the plaintiffs in the Queen's Bench Division for an injunction restraining the defendants and each of them from using the words "Camel hair" as descriptive of or in connexion with belting manufactured by them or either of them or belting (not being of the plaintiffs' manufacture) sold or offered for sale by them or either of them without clearly distinguishing such belting from the belting of the plaintiffs; with this declaration judgment of Collins J. in all other respects restored: Cause remitted to the Queen's Bench Division.

Lords Journals, March 26, 1896.

Solicitors for appellants: *W. J. & E. H. Tremellen, for A. Macdonald Blair, Manchester.*

Solicitors for respondents: *Chester, Mayhew, Broome & Griffithes, for Chew & Sons & Hilditch, Manchester.*

[HOUSE OF LORDS.]

CALLANDER AND TROSSACHS HYDROPATHIC COMPANY, LIMITED, AND THE EAGLE PROPERTY COMPANY. } APPELLANTS; H. L. (Sc.) 1896 May 8.

AND

MARSHALL . . . . . RESPONDENT.

Superior and Vassal—Obligation in Feu Charter to rebuild—Disposition of Feu after Obligation has become enforceable—Conveyancing (Scotland) Act, 1874 (37 & 38 *Vict. c.* 94), *s.* 4, *sub-s.* 2.

A proprietor by feu-contract disponed certain subjects to a company "and its successors and assignees whomsoever" under the condition (inter alia), "That the company and its foresaids" should be bound to erect buildings suitable for a hydropathic establishment of not less value than 15,000*l.* and to uphold buildings of that value in all time coming, and to keep the same insured against fire to the extent of not less than that sum, and in case the said buildings should be destroyed by fire, to rebuild the same so as to maintain the total value of 15,000*l.* Buildings were erected of the stipulated value, and insured. The company sold the subjects to the first-named appellants. On November 7, 1893, the buildings were destroyed by fire, and on the 27th of the same month the superior, the respondent, raised an action against the first appellants for performance of the obligation to rebuild. Before defences were lodged the first appellants, by a duly recorded disposition, conveyed the subjects to the second appellants, who subsequently conveyed them to one John Wilson. All these were thereafter made parties to the action.

The first appellants then pleaded that, as they were no longer vassals in the feu, they were not liable in the performance of the obligation.

The First Division of the Court of Session decided that the obligation, having become prestable during the first appellants' tenure, continued to be binding upon them; and (2.) that all the defenders were jointly and severally liable to rebuild in respect that the obligation was a condition of the grant remaining unfulfilled during the respective periods of their tenure of the subjects (22 Rettie, 954).

Upon appeal to the House of Lords the appellants, after argument, consented that the appeal should be dismissed.

THE appellants, the Callander and Trossachs Hydropathic Company, were in possession of the buildings referred to in the head-note at the date of the fire. They conveyed the subjects to the second appellants, the Eagle Property Company, who in their turn conveyed them to one John Wilson,

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who was not an appellant. At the date of the fire the buildings were insured, and the first-named appellants had recovered the insurance money, which amounted to about 14,000*l.* The First Division, substantially affirming the Lord Ordinary's judgment, pronounced the decision given above.

On appeal, *The Dean of Faculty* (*Asher, Q.C.*), (with him *W. Campbell*, of the Scottish Bar), for the appellants, at first contended that the decree creating three successive vassals jointly and severally liable was wrong, for it should only have proceeded against John Wilson, the entered vassal for the time being, under the Conveyancing (Scotland) Act, 1874, s. 4, sub-s. 2. But, after a lengthened argument, he consented to have the appeal dismissed, and the appeal was dismissed accordingly.

Balfour, Q.C., and *John Wilson* (both of the Scottish Bar) appeared for the respondent.

Agents for appellants: *Deacon, Gibson & Medcalf, for Simpson & Marwick, W.S., Edinburgh.*

Agents for respondent: *Ranken Ford, Ford & Chester, for J. & J. Turnbull, W.S., Edinburgh.*

[PRIVY COUNCIL]

COCHRANE . . . . . PLAINTIFF; J. C.*

AND 1895

MACNISH AND SON . . . . . DEFENDANTS. *Nov.* 21, 23.

1896

ON APPEAL FROM THE SUPREME COURT OF JAMAICA. *Feb.* 29.

Law of Jamaica—Registration of Trade Marks Law, 1888—"*Club Soda*"—*Alleged Misrepresentation of his Goods by the Plaintiff.*

In an action by the appellant who had registered his English trade-mark of "Club Soda" in Jamaica, under Law 17 of 1888, it appeared that the respondents persisted in selling their goods under the same name in a way calculated to deceive:—

Held, that the appellant was not disentitled to relief merely because he had printed on his label the words "manufactured in Ireland by H.M. Royal Letters Patent." Those words, explained by the evidence to relate to patented machinery, did not necessarily represent or induce belief contrary to the fact that the ingredients of their article were patented.

APPEAL from an order of the Supreme Court (Nov. 19, 1894), affirming an order of Northcote J. dismissing the appellant's action with costs.

The facts are stated in the judgment of their Lordships.

Byrne, Q.C., and *John Cutler*, for the appellant, contended that the Supreme Court was wrong in holding him disentitled to relief merely for his user of the words "manufactured in Ireland by H.M. Royal Letters Patent" on his label. In the circumstances of the case those words were not a misrepresentation. The explanation was that those words were first introduced into the label in 1892 when it became necessary for purposes of importation into the United States to allege the country of origin. They were not intended to represent and did not necessarily or even primarily convey the meaning that there was any patent for the ingredients of which the soda water was made. Those ingredients are matter of common

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and Sir RICHARD COUCH.

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knowledge, and no one could be led to suppose that such ingredients were or could be patented. The meaning intended and conveyed was that the machinery was patented—the machine, that is, for aerating the soda water, which is an important step in its manufacture. Reference was made to Kerly on Trade-marks, p. 342; *Hammond* v. *Brunker* (1); *Montgomery* v. *Thompson* (2); *Leather Cloth Co.* v. *American Leather Cloth Co.* (3); *Ford* v. *Foster* (4); *Cheavin* v. *Walker* (5); *Melachrino* v. *Melachrino Cigarette Co.* (6); *Re Dexter's Trade-mark.* (7)

Moulton, Q.C., Willis Bund, and *Ernest Spencer,* for the respondents, contended that they had not, on the evidence, infringed the appellant's trade-mark, even if it were a valid one. The word "club" as used by the appellant is not a distinctive but a descriptive term indicating the quality of the goods sold under it. Then the trade-mark contained an untrue statement calculated to deceive the public to the effect that their soda water was manufactured by Royal Letters Patent. The words complained of amount to a representation that the appellants' soda water is protected by patent as well as by trade-mark, and would be so understood by every purchaser. It cannot be said that such a misrepresentation is immaterial or collateral; it relates to the essential character of the article sold. Reference was made to *Sykes* v. *Sykes* (8); *Leather Cloth Co.* v. *American Leather Cloth Co.* (9); *Melachrino* v. *Melachrino Cigarette Co.* (6); *In re Wood's Trade-mark* (10); *Gianacli's Trade-mark* (11); *Ex parte Stephens* (12); *Singer Co.* v. *Loog.* (13)

Byrne, Q.C., replied.

1896 Feb. 29.

The judgment of their Lordships was delivered by

LORD MORRIS. Under the firm of Cantrell and Cochrane the appellant Sir Henry Cochrane, who was formerly in

(1) 9 R. P. C. 301.
(2) [1891] A. C. 217, 225.
(3) 11 H. L. 543.
(4) L. R. 7 Ch. 611.
(5) 5 Ch. D. 850.
(6) 4 R. P. C. 215.
(7) 10 R. P. C. 269.
(8) 3 B. & C. 541.
(9) 4 D. J. & S. 137.
(10) 32 Ch. D. 247.
(11) 6 Rep. Pat. Cas. 467.
(12) 3 Ch. D. 659.
(13) 8 App. Cas. 15.

partnership with a person named Cantrell, but is now trading on his own sole account, carries on the business of a manufacturer of aerated and mineral waters in Dublin and Belfast.

The principal part of the business of the firm is the production of soda water for consumption at home and abroad. The sales in the United Kingdom are very large; the export trade seems to be larger still.

In 1877 the firm registered in England a trade-mark for soda water having the words "Club Soda" as its prominent and distinguishing feature. Their soda water with this mark became known both in the trade and by the public as "Club Soda." It was advertised ordered and invoiced as such. The result was that the term "Club Soda" came to mean Cantrell and Cochrane's soda water and nothing else.

From the year 1887 the firm have been in the habit of shipping Club Soda to Jamaica. In the three years 1890, 1891, and 1892 the export to Jamaica amounted to 28,000 dozen.

In the early part of 1892 the appellant was informed for the first time that the respondents Messrs. McNish & Son were selling soda water in Jamaica as Club Soda. He then applied for registration in Jamaica, in accordance with the Registration of Trade Marks Law, 1888 (Law 17 of 1888) and an amending Act, Law 6 of 1889. Under the Law of 1888 the proprietor of an English trade-mark is entitled as of course to register it in Jamaica, on lodging with the Registrar a certified copy of the entry in the English register. On obtaining registration the appellant, through his solicitors in Jamaica requested the respondents to discontinue the use of the term "Club Soda" in connection with their soda water manufactured in the island. They declined to do so, and then this action was brought.

The respondents' case was that the words "Club Soda" in their label were not borrowed from the appellants' label at all. They were agents, they said, for the sale of some American whisky called Club Whisky, and so the term suggested itself to them when they began to make soda water in 1890. They insisted that their labels and advertisements were not calculated to deceive or to lead any purchaser to believe that the soda water which they sold was soda water of

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the appellants' manufacture. They further submitted that in any event the appellant was disentitled to relief by reason of certain statements contained in his label or trade-mark, which they alleged to be false and misleading.

The action came on for trial on April 16, 1894, before Northcote J., acting as Chief Justice. His Honour gave judgment for the defendants with costs. He found that the words "Club Soda" had, at the time of the commencement of the action, acquired in the trade the meaning of soda water made by the plaintiff. But he held that the defendants, although they had made use of the word "Club" which he said was probably "a material part of plaintiff's trade-mark as it communicated that name to his goods," had successfully distinguished their soda water from that of the plaintiff and had made the distinction perfectly clear.

On appeal to the Supreme Court Northcote J. adhered to the view which he had expressed in his judgment at the trial. The other members of the Court, Lumb and Jones JJ., concurred with Northcote J. in holding that the words "Club Soda" meant soda water made by the plaintiff. But they were both of opinion that those words, as used by the defendants, were calculated to deceive, and that ordinary purchasers or consumers of soda water would be misled, although the two labels were so dissimilar that the one could not be mistaken for the other. They held, however, that the plaintiff was not entitled to relief by reason of his having attached to his trade-mark a statement which they considered to be a misrepresentation.

As regards the first point, on which there are concurrent findings and on which the evidence appears to be abundant and uncontradicted, the learned counsel for the respondents were not in a position to dispute the conclusion arrived at in the Court below. Nor was there much to be said in regard to the second point. It is quite true that no one could mistake McNish's label for Cantrell & Cochrane's and there is little or no probability that any one in the trade would be deceived by the words "Club Soda" on McNish's label. But that is not enough. As the learned judges who formed the majority in the Court of Appeal observed, the acting Chief Justice did not

sufficiently consider the danger to the consumer. In the case of casual consumers the probability of deception is obvious. People who ask for soda water at a restaurant or call for soda and whisky over the counter do not, at any rate, as a rule, handle the bottle or examine the label. Their Lordships have no hesitation in agreeing with the Court of Appeal that the use of the words "Club Soda" by the respondents is calculated to deceive. So far their Lordships agree with the Supreme Court.

Then comes the question, has the appellant disentitled himself to the protection of the Court by reason of the representations which he has made in connection with his trade-mark?

The trade-mark of the appellant, as registered in England and Jamaica, is a rectangular label with a broad band formed by parallel lines running diagonally from the lower corner on the left hand to the upper corner on the right. On this band are printed within inverted commas so as readily to catch the eye the words "Club Soda." Underneath, in brackets, are the words "specially prepared." In the triangular space above the band are arranged the words "Cantrell and Cochrane's Super Carbonated" and in the triangular space below the words "Works—Dublin and Belfast." As the trade-mark is actually used the label containing the trade-mark proper has a narrow border on each side bearing the words "Registered Trade Mark," and there is a margin or border below on which are printed the words "Manufactured in Ireland by H.M. Royal Letters Patent." The question turns on the meaning of those words. Construed grammatically they have really no meaning. The majority of the learned judges in the Supreme Court held that they amounted to a representation that the composition or ingredients of the article offered for sale by the appellant as Club Soda were protected by an existing patent. The learned counsel for the respondents urged this view upon the Court and contended strenuously that any person reading the appellant's label would suppose that he was invited to buy a patented article. They argued, moreover, that by this representation persons would or might be deterred from engaging in the manufacture of soda water. As the composition and manufacture of

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soda water are matters of common knowledge, there does not seem much ground for apprehension on that score. And it is at least open to doubt whether the word patent, as applied to soda water, would be a complimentary or attractive epithet. To some the term would, perhaps, convey the idea that the article was not the genuine thing but a substitute prepared in accordance with the specification of some ingenious patent. At any rate, it is to be observed that the appellant has never attempted to connect the word patent with the name of the article which he makes. The words which have given rise to this controversy are not to be found in any of his advertisements, or even in all his show cards. Still they are no doubt used as an advertising puff and as an attractive embellishment of his trade-mark, and they do certainly represent that there is a patent of some sort connected with or used in his manufacture. The appellant and his manager were called upon for an explanation. Their explanation was this. With some slight exceptions, they said, we use nothing but patented machinery in the manufacture of our soda water, and for our most important machine we have an exclusive licence in Ireland; the words were intended to mean "manufacted in Ireland by means of patented machinery." Considering that it is common ground that in the manufacture of soda water there is no secret and frequently no soda and that all that is required, as one of the respondents says, is care and cleanliness, that does not seem an unreasonable or unnatural explanation. There is no suggestion to be found in the evidence (which has certainly not been unduly limited or curtailed) tending to throw doubt on that explanation or to shew that anybody has been or could be misled by words on which so much labour and attention have been spent in argument, and to which apparently little or no importance is attached elsewhere. The appellant's trade is an honest trade. And their Lordships are not prepared to hold that by reason of some words not designed to mislead, and at most equivocal, the appellant has been guilty of a misrepresentation which disentitles him to relief.

The respondents erred, unwittingly at first. But as they persisted in their error after their attention was called to the

fact that they were infringing the appellant's rights, their conduct in the eye of the law amounts to fraud, and they must be held responsible for the consequences.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court ought to be reversed with costs, and that the appellant is entitled to judgment with costs, awarding an injunction to restrain the respondents from infringing his trade-mark by the use of the words "Club Soda," or any words calculated to lead to the belief that soda water manufactured by them is soda water of the appellant's manufacture, and from selling or offering for sale as Club Soda any soda water not manufactured by the appellant.

The respondents will pay the costs of the appeal.

Solicitor for appellant: *C. Urquhart Fisher.*
Solicitors for respondents: *Tippetts & Son.*

[PRIVY COUNCIL.]

CHADWICK . . . . . DEFENDANT;

AND

HON. SIR WILLIAM M. MANNING . . PLAINTIFF.

AND THE REVIVED APPEAL.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract of Indemnity—Estoppel—Evidence as to abandonment of Claim.

The plaintiff and defendant jointly guaranteed to a bank payment of a certain cash bond, the plaintiff agreeing with the defendant to indemnify him from all liability thereunder. Seven years afterwards the bank released the guarantors from liability on payment by each of 1000*l.*

In a suit by the plaintiff to declare the agreement of indemnity discharged, and to restrain the defendant from continuing his action thereon:—

Held, that in the absence of a contract to discharge it, the defendant could not be estopped from enforcing it by any representation, express or

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* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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implied, of his intention to abandon it. To raise an equity on behalf of the plaintiff there must have been misrepresentation of existing facts.
Jordan v. *Money* (5 H. L. C. 185) approved.

APPEAL from a decree of Owen J., Chief Judge in Equity, dated September 6, 1894.

The facts and proceedings are set out in the judgment of their Lordships.

The grounds on which the respondent based his claim were that by the agreement of compromise with the bank, to which the bond debtor was a party and which was negotiated by the appellant, the position of the parties was entirely altered; that the respondent thereby gave up his right to be recouped by the bond debtor and also his lien on the lands charged in his favour; and that such agreement was come to on the footing that 1000*l.* was the total amount that he should be called upon to pay.

Byrne, Q.C., and *Alfred Adams*, for the appellant, were stopped by their Lordships, who said that the reasons for the judgment appealed from were not apparent.

Cozens-Hardy, Q.C., and *J. E. Bankes*, for the respondents, the executors of the above-named plaintiff, deceased, contended that there was no evidence that the letters relied on as proving a contract of indemnity were ever accepted by the appellant. If there had been such contract there was a subsequent binding engagement not to enforce it.

Counsel for the appellant were not heard in reply.

1896
Feb. 22.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decree of the Supreme Court of New South Wales pronounced by His Honour, Owen J., Chief Judge in Equity. The decree restrains the appellant from proceeding at law to enforce an agreement for indemnity contained in two letters addressed to him by the late respondent, Sir William Manning, formerly Chief Justice of New South Wales, and dated July 30, and August 7, 1885, and it orders that those letters be delivered up to be cancelled.

Sir William, who was plaintiff in the suit, is now dead. The suit has been revived against his executors.

Though the evidence is voluminous the facts of the case may be stated shortly.

The appellant, Robert Chadwick, a timber merchant in Sydney, was a near neighbour of Sir William Manning. For many years Sir William and Mr. Chadwick were on very intimate terms of friendship. In 1880, an English gentleman, a Mr. Lister Kaye, and his wife were staying with Sir William. On that occasion Mr. Chadwick met Mr. Lister Kaye, who was a relative or connection of Sir William, more than once, but their acquaintance was only slight and casual. After a short visit Mr. Lister Kaye left Sydney and went to Norfolk Island to help his friend Bishop Selwyn in some missionary work, and Mr. Chadwick did not see him again for several years. In 1885, Mr. Lister Kaye returned to Sydney to find himself a ruined man. It seems that when he was in Sydney in 1880 he had placed the whole of his fortune, which amounted to a sum of between 5000*l.* and 6000*l.*, in the hands of a solicitor named Heron, who was a son-in-law of Sir William Manning, and whose firm acted as Sir William's solicitors. Heron fraudulently misappropriated the money, lost it all, and became insane. Sir William was in deep distress on account of the misfortune which had befallen his family. He was a loser himself by Heron's frauds. At the same time he was anxious to save what he could for Mr. Lister Kaye. He had no act or part in placing the money in Heron's hands. Apparently he knew nothing about the transaction until the crash came, but he seems to have thought, not unnaturally, that Heron's connection with him might have had something to do with the blind confidence which Mr. Lister Kaye reposed in Heron's integrity. Accordingly Sir William invited Mr. Lister Kaye to stay with him and invoked the assistance of Mr. Chadwick. As Sir William's solicitors were not available Mr. Chadwick introduced Mr. Lister Kaye to his own solicitors, Messrs. Holdsworth and Evans. It was discovered that some portion of Mr. Lister Kaye's money had been laid out by Heron in conditional purchases of land at Wyong, which he had taken in his own name, and then mortgaged for his own purposes, but there was reason to believe at the time that the equity of

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redemption was of considerable value. Mr. Chadwick thought well of the property as coal had been found in the neighbourhood. At Sir William's instance, and out of regard for him and sympathy with Mr. Lister Kaye's unfortunate position, Mr. Chadwick consented to join with Sir William in procuring an advance from the Australian Joint Stock Bank with the view of paying off the mortgage and securing the land for Mr. Lister Kaye's benefit. It appeared, however, on investigation that there were other encumbrances, and then Mr. Chadwick consulted Messrs. Holdsworth and Evans. He was advised by them in a letter of July 29, 1885, not to go on with the business, as the chance of benefiting Mr. Lister Kaye seemed very remote. Acting on this advice Mr. Chadwick told Mr. Lister Kaye that he must withdraw from the proposed arrangement.

On July 30, 1885, Sir William wrote to Mr. Chadwick to say that he could not be surprised at Mr. Chadwick's decision, but that he had made up his mind to go on with the matter himself; so he asked Mr. Chadwick to consent to be his surety with the bank instead of becoming a principal, and he added, "If you let the credit stand as it is with only the change of relations above-mentioned I . . . will give you a formal acknowledgment of exclusive liability." Mr. Chadwick at once complied with Sir William's request, and informed Messrs. Holdsworth and Evans of the new arrangement.

On August 7, 1885, Sir William sent to Mr. Chadwick for his execution a cash credit bond for 2500*l.* and interest in favour of the bank with the following letter:—

"R. Chadwick, Esq. "Wallaroy,
"August 7, 1885.

"My dear Chadwick,—I send with this Mr. Lister Kaye's cash credit bond for your signature as a surety with me.

"If you will sign it I undertake to hold you harmless.

"Yours very truly,
"W. M. Manning."

Mr. Chadwick signed the bond on the faith of this letter and told Sir William that he accepted his indemnity.

Mr. Chadwick put the letters of July 30 and August 7 into

a private drawer. They were never again referred to in conversation between Sir William Manning and Mr. Chadwick, and apparently in the course of time their existence was completely forgotten by Mr. Chadwick, if not by Sir William himself.

Mr. Lister Kaye left Sydney for England before the transaction was completed. He did not return to the Colony again.

Matters drifted on for several years. The interest to the bank went on accumulating. No opportunity occurred of disposing of the land to advantage. Still there was no apprehension of ultimate loss. In the meantime, owing to strikes and other causes, a long period of depression set in. All property in the Colony, especially mining property, fell in value. The financial position both of Sir William Manning and Mr. Chadwick altered for the worse. Sir William, who had retired from the Bench in 1886, was living on his pension. His private means seem to have been small. Mr. Chadwick was hampered with a large building speculation and apparently had no money at his command.

By July 1892 the debt to the bank had increased to 5400*l.* or thereabouts. The bank began to press for the liquidation of the account. The manager told Mr. Chadwick that he should look to him for payment, as the more solvent man of the two. Mr. Chadwick became alarmed. He wished Sir William Manning to join with him in putting pressure upon Mr. Lister Kaye, who had lately come in for some money. This Sir William refused to do. Ultimately it was arranged, without the intervention of Sir William, but with his knowledge and assent, that the bank should accept 5000*l.* in complete satisfaction of the debt, that Sir William and Mr. Chadwick should each pay 1000*l.*, and that Mr. Lister Kaye should find the balance and take the land free of all claims. The arrangement was duly carried out, and Sir William and Mr. Chadwick were relieved from their liability to the bank. It is perfectly clear that throughout the negotiations which led to this arrangement Mr. Chadwick regarded himself as being on precisely the same footing as Sir William. He wrote and acted just as if the agreement of indemnity were not in existence, or as if it had completely vanished from his mind.

Shortly afterwards, in looking through his papers, Mr.

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Chadwick came upon the letters of July 30 and August 7, 1885. He mentioned the circumstance to Mr. Hubert Manning, a son of Sir William's, who had interested himself in the matter from the first, and said that he thought he was entitled to the benefit of the indemnity. Mr. Hubert Manning became extremely angry and told his father. Sir William, who was a very old man then and in failing health, was much annoyed. He declined even to see Mr. Chadwick on the subject. And then a correspondence took place, in the course of which Sir William apparently persuaded himself that Mr. Chadwick's claim had no foundation either in law or honour. Mr. Chadwick was hurt by the tone of Sir William's letters, but he seems to have treated Sir William with the respect due to his position and character, though he still insisted on his rights. Sir William assured Mr. Chadwick that he fully believed his statement that he had completely forgotten the agreement of indemnity; but he contended, in a very elaborate argument, that the agreement had been tacitly waived or abandoned. Mr. Chadwick then proposed to refer the matter privately to arbitration; but Sir William refused the offer, and challenged Mr. Chadwick to bring forward his claim in a court of law, where he could, he said, meet it openly while he was still alive.

Thus challenged, Mr. Chadwick brought an action at law claiming the sum of 1037*l.* 10*s.* as due to him under the indemnity.

In August 1893, Sir William filed his statement of claim in this suit, praying for a declaration that the agreement for indemnity, contained in the letters of July 30 and August 7, 1885, had been discharged, and asking for an order that the same should be delivered up to be cancelled, an injunction against the continuance of the action at law and consequential relief.

The suit came on to be heard on August 21, 1894, and the three following days before the chief judge in equity. On September 6, judgment was given in favour of the plaintiff.

His honour accepted somewhat grudgingly Mr. Chadwick's statement that he had forgotten the indemnity. "I am not bound," said his honour, "to accept the plaintiff's belief in this respect, and I can only do so on the assumption that the

defendant at the time of receiving the indemnity treated it as of no importance and not intended to be enforced. Otherwise I cannot understand how a man of business with his mental faculties unimpaired could have forgotten the indemnity on the faith of which, as he now says, he entered into this transaction." That Mr. Chadwick did enter into the transaction on the faith of the indemnity is clear beyond all question. No doubt to any one who reviews the whole transaction with all the facts before him, it must seem strange that in 1892 Mr. Chadwick should have forgotten the indemnity. Such a thing, however, is not incredible. Memory plays strange tricks sometimes. Mr. Chadwick deposed on oath to the fact that he had forgotten it, and there was not the slightest attempt in cross-examination to shake his testimony on that point. His veracity was altogether unimpeached. Moreover, there could not have been any motive for concealment on his part. He had nothing to gain by keeping back the indemnity. On the contrary, in 1892, when he was urging Sir William Manning to put pressure on Mr. Lister Kaye, and a certain coolness in consequence sprung up between them, the indemnity, if it had occurred to him then, would have afforded a ready argument in favour of immediate settlement, and one which Sir William was not in a position to gainsay. Mr. Chadwick naturally resented the suggestion that he was thinking of the indemnity while he was pressing for the settlement. But as a matter of law it is not easy to see what difference it would have made if it had been in his thoughts all the time. The result in law must be the same whatever may have been the state of Mr. Chadwick's mind.

The substance of his honour's judgment is contained in the following passages:

"It is clear to my mind . . . . that the plaintiff, who knew nothing of the defendant's forgetfulness of the indemnity, believed and was justified in believing that the defendant had waived his indemnity and did not intend to enforce it. Acting on that belief the plaintiff expressly gave up the land to Mr. Lister Kaye free of any lien or claim by him."

* * * * * *

"In my opinion the plaintiff was induced by the defendant's

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conduct to believe, and as a reasonable man he was justified in believing, that the defendant did not intend to enforce the indemnity given to him, and that notwithstanding such indemnity he was equally with the plaintiff liable for the debt, and acting on that belief the plaintiff was induced to alter his position to his own damage.

"This being so, the defendant is estopped from enforcing the indemnity, and the plaintiff is entitled to the decree as prayed with costs."

His honour's judgment, it will be seen, is rested entirely on the doctrine of equitable estoppel by representation. It is difficult to see what room there is for the application of that doctrine in such a case as the present. Mr. Chadwick was forgetful and silent, or silent, it may be, without the excuse of forgetfulness. But silence is innocent and safe where there is no duty to speak. And it can hardly be suggested that Mr. Chadwick was in duty bound to remind Sir William of an obligation which he had at least as much reason to remember as Mr. Chadwick himself.

Assuming, however, that Mr. Chadwick is chargeable with a representation which may have misled Sir William, it appears to their Lordships that the conclusion at which his honour arrived is in direct conflict with the law laid down by the House of Lords in *Jorden and Wife* v. *Money*. (1) The head-note to that case, the accuracy of which was not challenged by the learned counsel for the respondents, is in the following words:

"Where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere, even though the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable engagements. To raise an equity in such a case, there must be a misrepresentation of existing facts, and not of mere intention."

The learned counsel for the respondents did not, of course,

(1) 5 H. L. C. 185.

question the law established by *Jorden and Wife* v. *Money* (1), nor did they deny its application to the view of the facts taken by his honour, which was certainly not unduly favourable to Mr. Chadwick. They endeavoured to argue that there was a contract on the part of Mr. Chadwick binding him not to enforce the indemnity. This argument was founded upon certain letters and telegrams which passed between the parties at the time when the settlement with the bank was made. The letter on which most reliance was placed was a letter of September 27, 1892, written by Sir William Manning to Mr. Chadwick in the following terms:

"Sydney,

"Dear Mr. Chadwick, "27th Sept. 1892.

"Referring to your negotiations for the settlement of matters under our guarantee of the Lister Kaye cash bond at the Australian Joint Stock I undertake to pay the sum of one thousand pounds, 1000*l.*, to be relieved of my liability.

"Yours faithfully,

"W. M. MANNING."

It was suggested that the liability there referred to included Sir William Manning's liability to indemnify Mr. Chadwick. But it is quite plain that the only liability present to the minds of the parties at the time of the settlement of 1892 was their liability to the bank. It is satisfactory to find that this was Sir William's own view. The very point was one of a series of "conclusions" on which he insisted in a letter, dated April 28, 1893, as being "manifest to his mind." Dealing with the settlement of 1892, "My indemnity of 1885 was not," he says, "in the mind of either of us in respect of that settlement."

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and the suit dismissed with costs.

The respondents must pay the costs of the appeal.

Solicitors for appellant: *Bell, Brodrick & Gray.*

Solicitors for respondents: *Burch, Whitehead & Davidson.*

(1) 5 H. L. C. 185.

[PRIVY COUNCIL.]

J. C.*
1895.
July 30.
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REYNOLDS AND ANOTHER . . . . . DEFENDANTS;

AND

ATTORNEY-GENERAL FOR NOVA SCOTIA AND OTHERS . . . . . } PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Nova Scotia—Revised Statutes, 5th Series, c. VII., s. 95—Application for renewal of Licence—Effect of Repeal of Section authorizing Renewal.

The appellants having obtained a licence to work for two years under s. 95, c. VII., of the Revised Statutes, 5th Series, afterwards applied under the same section for a renewal thereof; but in the meantime s. 95 had been repealed by an amending Act of 1889:—

Held, that at the date of the application to renew the power to grant it was gone, for even if the amending Act were so construed as not to interfere with vested rights, the appellants possessed a privilege and not an accrued right in reference to the renewal sought.

Main v. *Stark* (15 App. Cas. 384) referred to.

APPEAL from a decree of the Supreme Court (May 12, 1894), affirming a decree of Meagher J. declaring that a renewal of a licence to work a certain coal-mining area within the province of Nova Scotia, granted to the appellants by the Commissioner of Mines and Public Works, was wholly unauthorized and void; and that the relator Cayley was entitled to have the lease of the said coal-mining area granted to him by the said Commissioner.

The action was brought by way of information by the Attorney-General of the Colony, on the relation of certain executors of the will of W. Cayley, deceased, of whom the above-named Cayley was one, to obtain a declaration in substance that the relators or some of them were entitled as against the appellants to a lease of certain mining rights, and that this grant by the Commissioner to the appellants was made without jurisdiction and wrong.

The facts are stated in the judgment of their Lordships.

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Finlay, Q.C., and *G. Elliott*, for the appellants, contended that their rights were not affected by the passing of Act c. 23 of 1889, passed on April 17 of that year. The Act ought not to have been construed by the Court below as having a retrospective effect, and thus to destroy their vested interests under the earlier Act c. 7 of the Revised Statutes, 5th Series. Under ss. 95 and 96 of the last-named Act the appellants were entitled under contract with the Government authorized by that Act to a term of two years with the further right for another year at their option. They were so entitled independently of any further exercise of discretion by the Commissioner. To complete their title to an extension, all they had to do was to pay a fixed sum, which they had paid, and the Government had accepted. Consequently the land was not vacant when the respondents applied for it, for the appellants' statutory rights were still in existence. [Reference was made to Maxwell on Statutes, 2nd ed. 257; *Reid* v. *Reid* (1); *Main* v. *Stark*. (2)]

Cozens-Hardy, Q.C., *Bordin, Q.C.* (of the Nova Scotia Bar), and *Bray*, for the respondents, were not heard.

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Feb. 29.

The judgment of their Lordships was delivered by

LORD MORRIS. This case comes by appeal from a judgment of the Supreme Court of Nova Scotia affirming a judgment of the Honourable Mr. Justice Meagher, by which it was decreed that the renewal of August 21, 1889, of the licence to work dated August 23, 1887, and granted to the appellants by the Commissioner of Mines and Public Works for the province of Nova Scotia and which purported to be granted and issued under the provisions of Chapter VII. of the Revised Statutes of Nova Scotia, 5th Series, was unauthorized by the said Act and was null and void, and consequently that the said renewal license to work should be set aside, and further decreed that the respondent Hugh St. Quentin Cayley on April 14, 1890, became entitled to have granted to him by the said Commissioner under the provisions of the said statute a lease of area described in his application, and that he should on the granting of the same stand possessed thereof for the benefit of himself and the other

(1) 31 Ch. D. 402. (2) 15 App. Cas. 384.

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relators on whose behalf he made application for the said lease, and further decreed that the lease of the said area granted to the appellants by the said Commissioner and dated February 18, 1891, was unauthorized and null and void, and that the appellants should deliver up the same to be cancelled. The main question in this case is whether the area for which the relator Cayley applied for a lease on April 14, 1890, was then vacant. The leading facts of the case are as follows: By lease dated December 3, 1866, the Commissioner of Mines of Nova Scotia granted a lease of a certain coal area to one Patrick Collins for a term of twenty years to commence from August 25, 1866. The lease contained the usual clause which provided that the holder of the lease was entitled to renew for a further extended period of twenty years provided six months' notice in writing was given previous to the expiration of the lease of the intention of the holder of the lease to renew for such further period. The lease of December 3, 1866, through various assignments became vested previous to August, 1886, in the respondents, the Toronto Coal Company, who were then in possession of the said demised area and worked the coal within same. The Toronto Coal Company had previous to the expiration of the six months instructed their solicitor to apply to the Commissioner for the renewal of the said lease; but by some miscarriage the application was not made until August 17, 1886. The Commissioner of Mines refused to renew on the ground that the six months' notice from the lessee to renew prior to the expiration of the lease had not been given. Consequently the area now in dispute became vacant on August 26, 1886, and on that day one J. W. Kelly Johnson made application, pursuant to s. 84 of Chapter VII. of the Revised Statutes, 5th Series, for a licence to search within the said area which had so become vacant. That licence was granted, and on September 23, 1886, assigned by Johnson to the appellants. The Toronto Coal Company remonstated against the granting of the licence to Johnson, but in vain, the Commissioner holding, and rightly holding, that he had no discretion to refuse the application of Johnson. On August 23, 1887, the appellants applied for a licence to work the area, and the Commissioner of Mines on that day issued

such licence to them. On August 21, 1889, the appellants, pursuant to s. 95, applied to the Commissioner for a renewal for one year of the licence of August 23, 1887, and their application was entered in the books of the Commissioner's office. On April 14, 1890, the relator Hugh St. Quentin Cayley, on behalf of himself and the other respondents, applied to the Commissioner under the provisions of Chapter VII. of the Revised Statutes, 5th Series, as amended by an Act passed on April 17, 1889, for a lease of a portion of the area in dispute. This application was refused by the Commissioner on the ground that the renewal licence to work of August 21, 1889, to the appellants was still in force, and on August 20, 1890, the appellants applied to the Commissioner for a lease of the said area. After some correspondence, the Commissioner held an investigation, and thereupon decided that the appellants were entitled to a lease pursuant to their application of August 20, 1890, and that the respondent Cayley's application for a lease could not be granted; and accordingly the Commissioner, by lease February 18, 1891, granted to the appellants the disputed area for a term of twenty years. Several questions were raised by the respondents as affecting the validity of this lease; but the case turns upon one question, namely, whether the renewal licence of August 21, 1889, was valid and authorized by the statute. Now the Commissioner had no power to grant any renewal licence except under the statutable authority conferred on him by s. 95 of Chapter VII. of the Revised Statutes, 5th Series, which enacts that "any licence to work shall be for a term of two years from the date of application and shall be extended to three years upon the additional payment by the holder of the licence of one-half of the amount originally paid for such licence." The amending Act of April 17, 1889, repeals, amongst others, s. 95 and amends s. 91 by substituting "lease" for "licence to work." When the appellants applied for the renewal for one year on August 21, 1889, the power of the Commissioner to grant such renewal was gone, as the section of the statute conferring it had been repealed. It has, however, been contended on the part of the appellants that the Act of 1889 ought not to be construed so as to have the effect of taking away

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their right under s. 95 of Chapter VII. No doubt the maxim, "Omnis nova constitutio futuris formam imponere debet non præteritis" has been applied to the extent that a new law ought to be construed so as to interfere as little as possible with vested rights, and in *Main* v. *Stark* (1) the Earl of Selborne says, "words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed," yet the result is that in all cases it is necessary to ascertain what the Legislature meant. In the present case the only existing licence the appellants had when the amending statute passed was one for two years expiring in August, 1889. They had a privilege to get an extension for one year under s. 95, but had no accrued right, and the object of the legislation of 1889 was to get rid of licences and substitute leases. It was open to the appellants after the passing of the Act of 1889 and before the expiration of the two years to have applied for a lease; but, instead of doing so, they applied for a renewed licence under the provisions of a repealed statute. The respondents, the Toronto Company, had, in 1886, fallen into the mistake of not applying for a renewal of their lease six months before it expired, and thereby they lost their right of renewal, and thus afforded the appellants the opportunity of obtaining their licence to work the coal in the disputed area. The appellants in turn, by not applying for a lease until August 20, 1890, gave the Toronto Coal Company through Hugh St. Quentin Cayley the opportunity of applying for a lease of the disputed area as being then vacant. Their Lordships are of opinion that the decree of the Supreme Court should be affirmed, and will humbly advise Her Majesty to that effect. The respondents are to have the costs of this appeal.

Solicitors for appellants: *Andrews & Andrews.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

(1) 15 App. Cas. 388.

[PRIVY COUNCIL.]

MOSES *alias* MOSS . . . . . APPELLANT;

AND

PARKER AND OTHERS . . . . . RESPONDENTS.

J. C.* 1895 Feb. 22; March 5.

Ex parte MOSES.

Practice—Special Leave to Appeal—Tasmanian Act No. 10 *of* 1858, *ss.* 5, 8.

By Tasmanian Act No. 10 of 1858, s. 5, disputes concerning lands yet ungranted by the Crown are referred to the Supreme Court, whose decision is to be final; and by s. 8 the Court is directed to be guided by equity and good conscience only, and by the best evidence procurable, even if not required or admissible in ordinary cases, and not to be bound by strict rules of law or equity or by any legal forms:—

Held, that the Crown's prerogative to grant special leave to appeal is inapplicable to a decision so authorized.

Théberge v. *Laudry* (2 App. Cas. 102) followed.

THE petition stated that on February 25, 1895, the petitioner had applied to the Supreme Court in the claims to grants of land jurisdiction for a grant in fee from the Crown of certain land in Hobart, and that thereupon seven caveats were entered by persons claiming the ownership, or as mortgagees of the subdivisions of the land applied for. The caveators raised the contention that the land had been already granted in 1838 to one John Moses in fee simple, and that consequently the Court had no power to deal with it; while the petitioner contended that the grant was for life only, and that he was entitled in succession to one Charles Connolly, deceased, who held under a location order made in 1826. The Supreme Court decided that the grant to John Moses was in fee simple. On June 11 the Court refused an application for leave to appeal to the Privy Council though made within the time prescribed by the Tasmanian Charter of Justice, and relating to land of value in excess of the appealable limit, on the grounds that under the Claims to Grants to Land Act (22 Vict. c. 10) the decision of

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the Court was final and conclusive, and that the right of appeal was taken away by such colonial statute. The petition prayed for special leave to appeal from the above decision, and also from the order refusing leave to appeal.

Crackanthorpe, *Q.C.*, and *John Montefiore*, for the petitioner, contended that the Supreme Court acted illegally in refusing to admit the appeal, for the petitioner had a legal right of appeal of which 22 Vict. c. 10, s. 5, did not, on its true construction, deprive him. If, however, the section were construed in a prohibitory sense, it was ultra vires. [Reference was made as to the powers of the local legislature to 9 Geo. 4, c. 83; 2 & 3 Vict. c. 70, s. 2; 13 & 14 Vict. c. 59; *Cushing* v. *Dupuy* (1); *La Cité de Montréal* v. *Les Ecclésiastiques de St. Sulpice*. (2)]

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The reasons for their Lordships' report were delivered by

LORD HOBHOUSE. This is an application made to Her Majesty in Council to allow an appeal from an order passed by the Supreme Court of Tasmania in its "Claims to grants of Land Jurisdiction." The arguments addressed to their Lordships have touched very little on the injury done to the petitioner by the order. They have been rested almost entirely on the contention that the petitioner has a right of appeal, and that his right has been denied by the Court. As this contention raises a question of importance, their Lordships proceed to deal with the application on that ground.

By the constitution of Tasmania the Supreme Court stands in the ordinary position of a colonial court of justice. Subject to certain restrictions, every suitor under its general jurisdiction may appeal to Her Majesty in Council. Or if prevented from appealing as of right, any suitor may ask for special leave to appeal by virtue of Her Majesty's prerogative. In this case, however, the Court was not acting in its general jurisdiction, but in one of a very special kind.

Previously to the year 1858, disputes respecting claims to land vested in the Crown and not the subject of any prior grant were referred to certain commissioners, whose duty it was to

(1) 5 App. Cas. 409. (2) 14 App. Cas. 660.

report to the governor who was "in equity and good conscience" entitled to a grant. They were expressly relieved from all rules of law, and all technicalities and legal forms. The governor was not bound by such reports, but made or withheld grants as he thought right. It is obvious that his decision could not possibly be open to a judicial appeal.

In the year 1858 the Tasmanian Legislature thought it right to refer questions of this class to the Supreme Court, and the powers of jurisdiction vested in the commissioners were transferred accordingly by Act No. 10 of that year. It was enacted by s. 5 that the decision and report of the Court should be binding, final, and conclusive between the parties concerned. And the governor, also, is to be bound to act in accordance with the report. Sect. 8 runs as follows:—

"In examining into and reporting upon all such applications and matters as aforesaid, the said Court and Clerk of the Court shall be guided by equity and good conscience only, and by the best evidence that can or may be procured, although not such as would be required or be admissible in ordinary cases; nor shall the said Court or Clerk of the Court be bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever."

The present petitioner applied for a grant of land, and certain persons entered caveats, alleging that the land was already granted to some one under whom they claimed. If so, the Court could not deal with the case. The question turned on the construction of a grant—whether it was made for life or in fee simple. The Court held that it was a fee-simple grant, which, so far as their duties went, put an end to the case. The petitioner then applied for leave to appeal; and the Court held that they were precluded from granting such leave by s. 5 of the Act of 1858. In this opinion they were clearly right.

This application, however, is made to the discretion of Her Majesty in Council; and the refusal of a claim to appeal as of right is only used, as it is often quite fairly used, to influence the discretion of the Crown in the petitioner's favour. So we are led to the further question whether the subject-matter is one to which the prerogative of granting appeals from courts of

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justice can apply. The Supreme Court has rightly observed that Her Majesty's prerogative is not taken away by the Act of 1858, but intimates a doubt whether it ever came into existence.

Their Lordships think that this doubt is well founded. They cannot look upon the decision of the Supreme Court as a judicial decision admitting of appeal. The Court has been substituted for the commissioners to report to the governor. The difference is that their report is to be binding on him. Probably it was thought that the status and training of the judges made them the most proper depositaries of that power. But that does not make their action a judicial action in the sense that it can be tested and altered by appeal. It is no more judicial than was the action of the commissioners and the governor. The Court is to be guided by equity and good conscience and the best evidence. So were the commissioners. So every public officer ought to be. But they are expressly exonerated from all rules of law and equity, and all legal forms. How then can the propriety of their decision be tested on appeal? What are the canons by which this Board is to be guided in advising Her Majesty whether the Supreme Court is right or wrong? It seems almost impossible that decisions can be varied except by reference to some rule; whereas the Court making them is free from rules. If appeals were allowed, the certain result would be to establish some system of rules; and that is the very thing from which the Tasmanian Legislature has desired to leave the Supreme Court free and unfettered in each case. If it were clear that appeals ought to be allowed, such difficulties would doubtless be met somehow. But there are strong arguments to shew that the matter is not of an appealable nature.

In the case of *Théberge* v. *Laudry* (1) this Board had to consider the effect of a Quebec statute which transferred the decision of controverted elections to the Legislative Assembly from the assembly itself to a court of justice. The statute provided that the judgment of the Court should not be susceptible of appeal. Though that provision would destroy the

(1) 2 App. Cas. 102.

right of a suitor to an appeal, it did not taken by itself destroy the prerogative of the Crown to allow one. But this board held that they must have regard to the special nature of the subject; to the circumstance that election disputes were not mere ordinary civil rights; and that the statute was creating a new and unknown jurisdiction for the purpose of vesting in a particular court the very peculiar jurisdiction which up to that time had existed in the assembly. And they came to the conclusion that the intention of the Legislature was to create a tribunal in a manner which should make its decision final to all purposes, and should not annex to it the incident of being reviewed by the Crown under its prerogative.

The reasons there given apply closely to the present case. Applications for land yet ungranted by the Crown are certainly not ordinary civil rights. They are created and regulated by the law of each colony, and in this colony were, up to 1858, carefully kept out of the province of legal claims. In 1858 they were transferred to the Court with an express provision that its decision should be final. So far the case resembles the Quebec election case. But it has also the very important additional incident, that the Legislature ordered the Court to be guided by the same principles as were laid down for the commissioners, and expressly exonerated them from all rules of law or practice. It is clear to their Lordships that these affairs have been placed in the hands of the judges, as persons from whom the best opinion may be obtained, and not as a Court administering justice between litigants; and they hold that such functions do not attract the prerogative of the Crown to grant appeals.

In *Théberge* v. *Laudry* (1) the Board pointed out that the case between the parties was one in which they would not think of admitting an appeal if the power existed. Their Lordships make the same remark here. Indeed, if we were to cast about for illustrations of the absurdity of appeals under such conditions as are created by the Act of 1858, no more glaring one could be found than the present case. For the petitioner's complaint is that the judges below have not sufficiently availed themselves of their emancipation from rules of law, equity, and

(1) 2 App. Cas. 102.

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practice, but, on the contrary, have suffered themselves to be guided by both law and common sense, first, in refusing to look at evidence tendered for the purpose of contradicting the plain words of a formal instrument, and, secondly, in giving to that instrument its plain effect in accordance with English law. On an appeal Her Majesty in Council would be asked to alter all that, and to decide in some other way on some principles not yet explained.

Their Lordships have humbly advised Her Majesty to dismiss this petition.

Solicitor for petitioner: *A. A. Banes.*

[PRIVY COUNCIL.]

J. C.* 1896 *Feb.* 28; *March* 20.

KING . . . . . DEFENDANT;

AND

VICTORIA INSURANCE COMPANY, LIMITED. . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

*Remedies of Insurers—Effect of Payment under Policy—Subrogation—Queensland—*40 *Vict. c.* 84, *s.* 5, *sub-s.* 6.

Payment honestly made by insurers in satisfaction of a claim by the insured entitles the insurers to the remedies available to the insured; and such remedies cannot be resisted on the ground that the payment was not within the terms of the policy:—

Held, that although the insurers could not by mere force of subrogation sue in their own name, yet that in this case the right to do so was conferred by assignment from the insured aided by s. 5, sub-s. 6, of the Judicature Act (40 Vict. c. 84), corresponding with the English Judicature Act of 1873.

APPEAL from an order of the Supreme Court (Dec. 7, 1894) varying a judgment in favour of the respondents by reducing the amount of damages awarded.

The action was brought against the appellant under "The

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

Claims against the Government Act" by the respondents as assignees under deed of all causes and rights of action of the Bank of Australasia in respect of loss and damage caused to certain wool, the property of the bank, by a collision between certain punts, the property of and under the control of the Queensland Government, and the lighter on which the wool was stowed.

The respondents contended that the loss and damage complained of were caused by the negligence of the officers and servants of the Government of Queensland in not properly mooring and watching their punts, and so occasioning the collision complained of; that, at the time of the collision and subsequent damage, the wool was covered by the policy of insurance; and that, by reason of the payment of the loss under the policy to the bank, and of the assignment by the bank and of notice thereof given to the government, they were subrogated to all the rights of the bank, and were entitled to sue in their own name.

The defence, so far as material to the appeal, was that the wool was not at the time of the collision and subsequent damage covered by the policy; that the deed of assignment did not entitle the respondents to bring this suit; that they were not entitled to sue in their own name.

The view taken by the Courts below is stated in the judgment of their Lordships.

Cohen, Q.C., and *Gye*, for the appellant, contended that the payment made by the respondents was, under the circumstances, a voluntary payment, and did not entitle them to recover. The risk was not covered by the policy, and moreover the policy itself did not attach until the wool was actually on board the *Dorunda*. Consequently the insurers were under no legal liability to the bank to pay them in respect of loss and damage incurred. The payment being voluntary, there was no subrogation to the rights and causes of action, if any, of the bank. Again, if there was subrogation the only right is to sue in the name of the assured, for 40 Vict. c. 84, s. 5, sub-s. 6, relates to choses in action and does not extend to torts;

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while *Simpson* v. *Thomson* (1) rules that the rights of insurers must be asserted in the name of the assured. Reference was also made to *Ryall* v. *Rowles* (2); *Castellain* v. *Preston* (3); *Hill* v. *Boyle* (4); 2 Spence's Equity, 852; Story's Equity, s. 1040 (*h*); *Prosser* v. *Edmonds* (5); *In re Park Gate Waggon Works Co.* (6); *British South Africa Co.* v. *Moçambique Co.* (7); *Stanley* v. *Jones.* (8)

Asquith, Q.C., *C. E. Jones*, and *Roskill*, for the respondents, contended that all rights of action of the bank, whether arising out of contract or tort, were lawfully assignable, and were, in fact, assigned by deed. Even if the construction of the Judicature Act contended for on the other side were right, and the section did not contemplate torts, still the deed of assignment did. Moreover, the appellants' case assumed that the loss was not within the policy, whereas both the parties to the policy honestly treated their own contract as covering such loss and acted accordingly, and it was not competent to the government to step in and give to this policy a different effect from that which the parties in good faith gave to it themselves.

Cohen, Q.C., replied.

1896 *March* 20.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellant is a nominal defendant representing the Government of Queensland in a suit instituted by the respondents to recover damages under the following circumstances. The Bank of Australasia effected an insurance with the plaintiffs "at and from Townsville to London viâ Torres Strait, including risk of fire and flood from sheep's back until water-borne at Townsville." The insurance was to be upon goods to be loaded in a vessel not named. In point of fact the goods were wool, and the vessel was called the *Dorunda*. The adventure was stated to begin from the loading of the goods on board the vessel. Some of the wool was on arrival at Townsville put on board a lighter belonging to a firm of wharfingers for the purpose of being conveyed to the *Dorunda*.

(1) 3 App. Cas. 279.
(2) 2 W. & T. 6th ed. p. 898.
(3) 11 Q. B. D. 380.
(4) L. R. 4 Eq. 260.
(5) 1 Y. & C. Ex. 481.
(6) 17 Ch. D. 234.
(7) [1893] A. C. 602.
(8) 7 Bing. 369.

While the lighter was moored to the wharf, a storm arose which broke away from their anchorage certain punts belonging to the government which had not been properly secured. The punts fell foul of the lighter, broke her away from her moorings, capsized her, carried her down stream, and so destroyed or damaged the wool. The bank claimed against the plaintiffs under the policy for a loss of 920*l*. The plaintiffs paid that amount and took a formal assignment from the bank of all their rights and causes of action against the government, the bank stipulating that the assignment should not authorize the use of their name in legal proceedings.

By way of defence the government denied negligence and liability altogether. That question was fully tried at Townsville before Cooper J. and a special jury, who found to the effect above stated, with the result that judgment was entered for the plaintiffs for 1007*l*. and costs.

The government have not further contested the question of negligence, but on a motion to set aside the judgment they raised two objections. One related only to the amount of damages, and in that they partially succeeded. The other was to the effect that the plaintiffs had no right of action, or at any rate none in their own name; because the loss was not within the risks covered by the policy, and because the assignment of a mere right to recover damages was illegal.

The view taken by the Supreme Court was that the plaintiffs were not, by the mere fact of paying the claim, subrogated to the rights of the bank. They thought that the damage done to the wool was not within the terms of the policy. The wool was not loaded on board ship, and therefore was not within the clause which makes the risk, or one of the risks, begin from that event. Whether the learned judge thought that the placing of the wool on board a wharfinger's lighter in the general course of trade at Townsville satisfied the term "water-borne," and so ended one risk or part of the risk, is not clear. At any rate the Chief Justice thought that the risk "from sheep's back until waterborne," which is expressed to be included in the risk from Townsville to London, did not attach, because the jury had found that the loss was caused by collision and not through

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fire or flood. Assuming that the plaintiffs were bound to pay, the Court held on the authority of *Simpson* v. *Thomson* (1) that they could not by mere force of subrogation sue in their own names. But they held that this right was conferred by the bank's express assignment, aided by the terms of s. 5, sub-s. 6, of the Judicature Act, 40 Vict. c. 86. That Act follows exactly the English Judicature Act of 1873. The learned judges below consider that the term "legal chose in action" includes all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful, and that the right in question is a right of that kind. On those grounds they sustained the judgment except as to the amount of damages.

The government have now appealed to Her Majesty in Council, claiming that the suit shall be dismissed. They argue that the loss sued on was not within the terms of the insurance; that the plaintiffs stand in the position of mere strangers making a voluntary payment to the bank, and bringing a law-suit; and that they have got no title which a Court either of Law or of Equity would recognise. They make the subordinate objection that the plaintiffs cannot sue in their own name; but Mr. Cohen's arguments go the whole length of denying that the plaintiffs acquired any right at all; and indeed in the face of the Judicature Act they must go that length in order to sustain the subordinate objection.

To their Lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. It is not alleged that there was anything but perfect good faith in the claim made by the bank and satisfied by the insurance company. It is not alleged that the question of negligence has not been as fully and fairly tried in this action as it could have been in an action by the bank; or that the government has been in any way prejudiced by the form of the action. But it is claimed as a matter of positive law that, in

(1) 3 App. Cas. 279.

order to sue for damage done to insured goods, insurers must shew that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling; at least Mr. Cohen was unable to furnish any authority for it, and they know of none. Yet it is difficult to suppose that such cases have not frequently occurred.

As regards the question whether the loss was or was not within the terms of the policy, their Lordships will make no observation but this, that whatever might have been the result of a dispute between the parties to it, there is nothing to suggest that the claim was not one which the insured might not honestly and reasonably make, or to which the insurers might not honestly and reasonably accede. They will assume, as the Court below has assumed, that the bank could not by the terms of the policy have compelled the insurers to indemnify them. Still if, on a claim being made, the insurers treat it as within the contract, by what right can a stranger say that it is not so? The payment would not be made if no policy existed; and it seems to their Lordships an extravagant thing to say that a payment made under such circumstances is a voluntary payment made by a stranger, and that it would be at least an excess of refinement to hold that it is not a payment on the policy, carrying with it the legal incidents of such a payment. Such settlements of claims between the parties concerned ought not to be reopened for a by-purpose at the instance of parties not concerned. To hold otherwise would convert rules of law framed for the purpose of checking speculations in law-suits into instruments for promoting law-suits which the parties interested are wise enough to avoid by agreement. Their Lordships have no doubt that if, after receiving payment from the plaintiffs, the bank had got damages from the government, a Court of Equity would have treated them as trustees for the

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plaintiffs to the extent of the payment, and that if it had been necessary to use the name of the bank a Court of Equity would have compelled the bank to permit it on the usual terms. Mr. Cohen says that no instance is to be found in the reports where the Court of Chancery has bound a defendant to give his name to be used in an action of tort. Nevertheless it cannot be doubted that insurers often have used the names of the insured to recover damages in tort, and have not heeded whether the payment made on their contracts of indemnity did or did not fall within their strict terms. If the reports are silent, the more probable explanation is that the kind of defence raised in the present case has not commended itself to lawyers.

It is true that subrogation by act of law would not give the insurer a right to sue in a court of law in his own name. But that difficulty is got over by force of the express assignment of the bank's claim, and of the Judicature Act, as the parties must have intended that it should be when they stipulated that nothing in the assignment should authorize the use of the bank's name.

Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term "legal chose in action." They prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term. They rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured. On this view the highly artificial defence of the Queensland Government fails, and the appeal must be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant: *Freshfields & Williams.*

Solicitors for respondents: *Phelps, Sidgwick & Biddle.*

[PRIVY COUNCIL.]

Considered. FUNG KAI SUN v. CHAN FUI HING [1951] A. C. 489

OGILVIE . . . . . PLAINTIFF;

AND

WEST AUSTRALIAN MORTGAGE AND AGENCY CORPORATION, LIMITED . DEFENDANTS.

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Feb. 27, 28; *March* 20.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

44 *Vict. No.* 10—*Rules and Orders, Order* XXXVI., *No.* 10—*Banker and Customer—Forged Cheques—Liability of Bank.*

Order XXXVI., No. 10, of the rules under 44 Vict. No. 10, does not empower the Court to give judgment in disregard of findings of the jury not objected to, merely because it sets aside one or more findings which have been objected to.

Where the effect of the former was that certain entries debited by the bank to their customer were in respect of cheques forged by one of its servants, that the customer was first informed thereof by the accredited agent of the bank who requested his silence, and that the customer in complying with that request acted honestly and with a view to what he believed to be the bank's interest:—

Held, that the silence of the customer was not a legal wrong to the bank, and that he was not estopped from relying on the forgery.

M'Kenzie v. *British Linen Co.* (6 App. Cas. 82) distinguished.

APPEAL from an order of the Supreme Court (June 30, 1893) whereby certain findings of the jury and a judgment for 1462*l.* and costs obtained by the appellant were set aside, and judgment was entered for the respondents with costs.

The relationship between the appellant and respondents was that of customer and banker, and the action was brought by the appellant for moneys which had been paid away by the respondents on certain cheques admitted to have been forged, and debited to the appellant's account. The main question at issue between the parties was whether the appellant had, under the circumstances stated in their Lordships' judgment,

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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ratified the said forged cheques, or had by his conduct precluded himself from averring against the respondents that the signatures to the cheques were not genuine.

The action first came on for trial before Onslow C.J., who pronounced a judgment of non-suit on the ground that, on the facts as proved, the plaintiff was, according to the principle laid down in *M'Kenzie* v. *British Linen Co.* (1), estopped from denying that the signatures to the forged cheques were genuine, and that he had ratified what the forger had done, and consequently that there was no evidence to go to the jury.

The Full Court set aside the non-suit, and directed a new trial. Hensman J. presided, and in the result, after questions put to the jury with the approval of counsel on both sides, a verdict as above stated was given in the appellant's favour.

The respondents thereupon moved the Full Court, and by their notice of motion asked that judgment should be entered for them or that a new trial should be had, on the following grounds:—

(1.) That the judge had misdirected the jury that there was evidence

(*a*) Of the ratification by the defendants of the action of Canning junior in permitting the forger to go to England.

(*b*) Of the waiver by the defendants of the plaintiff's wrongful acts of negligence.

(2.) That the verdict was against the weight of evidence and contrary to the direction of the learned judge, and perverse, inasmuch as the jury found

(*a*) That no damage or prejudice was caused to the defendants by the conduct or defence of the plaintiff.

(3.) That the verdict was against the weight of evidence, inasmuch as the jury found

(*a*) That assuming that the plaintiff acted wrongfully towards the defendants, or that there was negligence on the plaintiff's part, the defendants waived such wrongful conduct or negligence.

(*b*) That the defendants ratified or adopted the action

(1) 6 App. Cas. 100.

of Canning junior in permitting the forger to go to England.

(*c*) That Canning junior had knowledge of the forgeries before the plaintiff had such knowledge.

By order of the Full Court, Hensman J. dissenting, the seventh, eighth, and ninth findings of the jury, set out in their Lordships' judgment, were set aside, and judgment was entered for the respondents.

The Chief Justice at the close of his judgment dealt categorically with the findings of the jury in this way:—

The first finding was to the effect that the defendants did wrongfully debit the plaintiff's account with the amounts of cheques which had been forged by a clerk in their office to the extent of 1462*l.* 8*s.* No exception can be taken to this finding. The second finding is that the plaintiff did not ratify the said forged cheques. This may or may not be so, but it does not touch the question of estoppel. The third question and answer seem to me somewhat ambiguous. The question is: "Did the plaintiff arrange with the forger to withhold the information of the forgeries from the defendants, and to take payment of money from the forger?" The answer was, "No." To which portion of the question does this answer apply? If to the former portion the answer is a prevarication, for the plaintiff did in fact arrange indirectly, if not directly, with the forger to withhold information. Should the negative be confined to the latter portion, the question of estoppel still remains untouched. By their fourth finding the jury state that Edmund Canning was held out to the public by the defendants as an agent of theirs, and that he became aware of the forgeries before the plaintiff. This finding might have been of the greatest value to the plaintiff—indeed, I think it would have concluded the case in his favour had it not been for the arrangements which he made with their agent to keep the directors in ignorance; but, as it is, this finding, in my opinion, cannot help him. The fifth question is as follows: "Did the plaintiff at and by reason of the request of Edmund Canning keep silence to the defendants with regard to the forgeries for six weeks, in order that the forger might go to England and send out the amount

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of the forged cheques to the defendants?" To this question, which involves several distinct propositions, the jury answered generally, "Yes." This finding, in my mind, clearly establishes the ground of estoppel on which the defendants rely. The fact that the plaintiff acted at the request of Edmund Canning, and the fact that the money was to be sent out to the defendants, are, in my opinion, quite immaterial. In a rider to the same question the jury are asked and find that the forger left the colony about May 23, 1891. By the answer to the sixth question, the jury find that the plaintiff acted honestly, and solely with a view to the benefit of the defendants. This may be so, but it is absolutely immaterial to the point in question. The plaintiff has no right to take upon himself to say what is, or what is not, for the benefit of the defendants, whilst he is acting secretly and without their knowledge. The seventh question is as follows: "Was the conduct or silence of the plaintiff the cause of damage or prejudice to the defendants? If so, to what extent or in what way?" The jury answered, "No." This question seems to me ambiguous. The jury should no doubt be asked to say whether the defendants had suffered any loss, because it is possible that, notwithstanding the escape of the forger, they might have recouped themselves from some source or other. But it is not for the jury, any more than it is for the plaintiff, to speculate whether the escape of the forger would result in loss or gain to the defendants. If the jury meant that the defendants have not in any way recouped themselves, their answer is in accordance with the evidence and the facts of the case. If they meant that the escape of the forger per se was not the cause of damage or prejudice to the defendants, in my opinion they were transgressing the limits of their province. Moreover, in so doing, they shewed, by ignoring the evidence, their animus in favour of the defendants; otherwise it is difficult to see how they could have passed over the uncontradicted evidence that Armstrong had within two or three days of his departure a substantial sum of money in his possession. It appears to me that the jury has answered this ambiguous question in the sense in which it could not be left to them; and, further, that their

answer is directly contrary to the evidence. The eighth and ninth questions bear upon the question of "ratification" by the defendants of the plaintiff's action in letting the forger escape. They are in these terms: (8.) Assuming that the plaintiff acted wrongfully towards the defendants, or that there was negligence on the plaintiff's part, did the defendants waive such wrongful conduct or negligence? (9.) Did the defendants ratify or adopt the action of Edmund Canning in permitting the forger to go to England as appeared? The jury saw their opportunity and answered both of these questions in the affirmative. I have given the reasons at length on which I have formed the opinion that these answers of the jury cannot be supported. I am of opinion that they are both contrary to the evidence, and are based upon a misapprehension of the law applicable to the case. It is impossible to withhold one's sympathy from the plaintiff in this case. He has been the victim of an audacious forgery, perpetrated by a clerk in the very office of his own bankers. He undoubtedly took a very foolish step in allowing the forger to escape, but he did this from no unworthy motive, and at the earnest entreaties of the son of the managing director of that bank. Against himself there is not the shadow of a suspicion; and it was only natural that the jury should wish to see him recover his money. In consequence, however, of his foolish action, the law has, as I read it, shifted the burden of the loss from the bank to himself.

Sir R. Reid, Q.C., and *Graham*, for the appellant, contended that he was entitled to judgment in his favour on those findings of the jury which were neither set aside nor objected to. The Full Court had no jurisdiction to enter judgment for the respondents in the face of those findings which were made on evidence proper to be considered by the jury. The appellant discharged his duty to the bank by communicating the errors on the debit side of his account to the bank's accredited agent. There was no duty imposed upon him of making a similar communication to its other officers. It is found that he acted honestly, and he is in that case not responsible for any acts or omissions by the bank's agent. There is no evidence that he ratified the

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forgeries, and he could not be estopped from alleging them to be forged by anything which passed between the bank and its own agent, or by the acts and omissions of the latter in which he was not implicated. Besides, if the bank had by the appellant's silence lost an opportunity of proceeding against a man of straw, that is not a ground of estoppel. At all events if it were it would only be so to the extent of damage sustained by the bank, and the jury have negatived damage. Reference was made to the *Duchess of Kingston's Case* (1), and the cases cited in the note, especially *Simm* v. *Anglo-American Co.* (2); *Seton* v. *Lafone.* (3)

Greene, Q.C., and *English Harrison*, for the respondents, contended that no evidence had been adduced to support the findings or answers of the jury to questions 7, 8, and 9. It was proved and not disputed that the appellant, being aware that the cheques in question were forgeries, and that the payments debited in his account might be repudiated by him, deliberately arranged with Canning junior that they should both of them conceal from the managing director and officers of the bank that those cheques were forged. The appellant was aware, at the time he so arranged, that the bank believed the cheques to be genuine. He must be held, therefore, to have elected to adopt the payments as properly made on his behalf, and to have consented to the forger leaving the colony on that understanding and undertaking to remit the moneys for the benefit of his account. Under these circumstances an estoppel arose within the authority of *M'Kenzie* v. *British Linen Co.* (4)

Counsel for the appellant were not heard in reply.

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The judgment of their Lordships was delivered by

LORD WATSON. The respondents in this appeal are a corporation with limited liability, carrying on business at Perth, in Western Australia, as stock and station agents, brokers, bankers and financial agents. Their only interest in this suit being in their capacity of bankers, they will be hereinafter

(1) 2 Sm. L. C. 9th ed. p. 945.
(2) 5 Q. B. D. 188.
(3) 18 Q. B. D. 139.
(4) 6 App. Cas. 82.

referred to as the bank. The appellant, a sheep-farmer in the Murchison district of the same colony, was, in 1891 and previous years, their customer, keeping a current account with them, and occasionally obtaining advances in account upon the security of his wool clip. The present action was brought by him in August, 1892, in order to recover, or obtain credit in account for, a sum of 1587*l.* 13*s.* 6*d.*, with interest, upon the allegation that, prior to May, 1891, cheques to the amount of the principal sued for, forged in his name by one Armstrong, a clerk in their employment, had been cashed by the bank and wrongly charged to his debit.

That the cheques in question were forged by Armstrong, who fraudulently received and appropriated their proceeds, has not been disputed in this appeal. The only defence relied on by the bank is, that the appellant is estopped from alleging that the cheques were forged by reason of his failure to communicate to them the fact of the forgery after it came to his knowledge, until their opportunities of bringing the forger to account had been altered for the worse. The appellant denies the allegations upon which the plea of estoppel is founded; and pleads in replication that the bank, subsequently, and in the knowledge of the fraud which had been committed by Armstrong, undertook and agreed to correct his account by omitting from the debit side the sums which they had paid upon the forged cheques.

The case went to trial before Onslow C.J., who non-suited the appellant upon the evidence led by him, being of opinion that it raised an estoppel against him, according to the law recognised by the House of Lords in *M'Kenzie* v. *British Linen Co.* (1) The non-suit was set aside by a full bench, and a new trial allowed.

On the second trial, Hensman J., who presided, at the close of the evidence, proposed to submit nine questions to the jury. He communicated these questions to the counsel for both parties, who approved of them; and, on the suggestion of counsel for the bank, a tenth question, being No. 5A, was added by him.

(1) 6 App. Cas. 82.

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Their Lordships need not notice the first of these questions, which relates to matters which are no longer in dispute; or the second, which was not referred to in the argument before them. The remaining queries, and the answers returned to them by them by the jury, were as follows:—

3. Did the plaintiff arrange with the forger to withhold information of the forgeries from the defendants and to accept payment from the forger?—*A.* No.

4. Was Edmund Canning held out to the public by the defendants as an agent or officer of the defendants? If so, had he knowledge of the forgeries before the plaintiff had such knowledge?—*A.* Yes.

5A. Did the plaintiff at and by the request of Edmund Canning keep silence to the defendants with regard to the forgeries for six weeks in order that the forger might go to England and send the amount of the forged cheques to the defendants?—*A.* Yes.

5B. Did the forger leave the colony, if so when?—*A.* Yes, about May 23, 1891.

6. Did the plaintiff act honestly and with a view solely to the benefit of the defendants, or did he act with a view to his own benefit or interest?—*A.* Solely for the benefit of the defendants.

7. Was the conduct and silence of the plaintiff the cause of prejudice to the defendants?—If so, to what extent and in what way?—*A.* No.

8. Assuming that the plaintiff acted wrongfully towards the defendants, or that there was negligence on the plaintiff's part, did the defendants waive such wrongful conduct or negligence?—*A.* Yes.

9. Did the defendants ratify or adopt the action of Edmund Canning in permitting the forger to go to England as aforesaid?—*A.* Yes.

Upon that verdict Hensman J. on May 16, 1893, entered judgment for the appellant for the sum of 1462*l.* 8*s.* with such interest thereon as might be found to have been charged by the defendants upon an account being taken by the registrar, and that the defendants' book be rectified accordingly; and as to

124*l.* 5*s.* 6*d.*, directed that an account be taken by the registrar as to whether such amount or any part thereof has been wrongly charged to the plaintiff in the defendants' books. Thereafter the bank gave notice of motion to set aside the verdict and judgment, and to have judgment entered for them or a new trial allowed.

Their Lordships find it necessary, in this case, to advert to the specific objections stated against the verdict in the notice of motion. It is trite law that these objections must be the measure of the right of the party objecting to impeach the findings of the jury, and that the findings of the jury, in so far as not objected to, are conclusive and binding upon him. The bank, in their notice, objected to the verdict upon two grounds. In the first place they alleged misdirection by the judge, inasmuch as there was no evidence to go to the jury upon the eighth and the ninth of the questions submitted to them. In the second place, they alleged that the answers made by the jury to the seventh, eighth, and ninth questions were against the weight of evidence and perverse. They stated no objection whatever, either in law or fact, to any of the findings of the jury in reply to the first six questions.

The motion was heard before a Full Court, consisting of Onslow C.J., with Stone and Hensman JJ., who (Hensman J. dissenting) not only set aside the seventh, eighth, and ninth findings of the jury, but proceeded to set aside the judgment entered by the presiding judge, and, in lieu thereof, to enter judgment for the bank, and to condemn the appellant in costs. In these circumstances, it became unnecessary to dispose formally of the bank's objection that the eighth and ninth questions ought not to have been submitted to the jury; but Stone and Hensman JJ. indicated the opinion, in which their Lordships agree, that the bank were precluded from taking the objection by the fact that both questions were sent to the jury with the consent and approval of their counsel.

In the judgments delivered by the majority of the Full Court, the course which they took in disposing of the case was justified on these grounds. The Chief Justice said: "The Court is fully possessed of all the facts, and in my opinion the judgment

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of the Court should be that the judgment entered up for the plaintiff should be set aside, and that judgment should be entered for the defendants." To the same effect Stone J. observed: "I think as the Court has all the proper materials before them, and nothing can be gained by sending the case again before a jury, the most economical course will be to enter judgment in accordance with the view taken by the Court."

Their Lordships do not wish to suggest that, in the circumstances of this case, a final decision upon the materials before the Court, without remitting for new trial, would either have been contrary to law or inexpedient. Order XXXVI., No. 10, of the rules which were framed in pursuance of the Supreme Court Act of the Colony (44 Vict. No. 10), provides that "upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly." The rule is a salutary and useful one, if it be kept within its proper limits. But it does not empower the Court, when and because it has set aside one or more findings which have been made matter of objection, to disregard or negative other findings of the jury which have not been objected to. In this case the findings of the jury in answer to questions 8 and 9 relate to issues of fact which are not involved in the first six questions. The answers returned to the latter appear to their Lordships to exhaust the issues of fact upon which these two questions turn, —(1.) whether the cheques were forged by a bank clerk, and were therefore not chargeable to the appellant's account; and (2.) whether, if they were forged, the appellant was by his own conduct estopped from asserting that fact in a question with the bank. The findings in answer to the eighth and ninth questions relate to an issue which does not arise unless the previous findings of the jury, which have not been challenged, are sufficient to raise an estoppel against the appellant.

It is not improbable that the learned judges who constituted the majority of the Full Court relied upon Order XXXVI., r. 10, as warranting the course which they adopted in giving judgment; but, if that were so, they appear to their Lordships to

have been under a grave misapprehension as to the import and effect of the rule. In dealing with the question of estoppel, they altogether ignore the findings of the jury, and they decide against the appellant, upon their own view of the facts, which it is impossible to reconcile with these findings.

Before discussing the effect in law of the first six findings of the jury, their Lordships will refer to certain facts appearing from the evidence, and not disputed in the argument upon this appeal, not for the purpose of contradicting these findings, which would not be legitimate, but in order to explain the nature of the issues to which they were directed.

The evidence does not afford any information as to the constitution of the bank beyond what may be collected from an extract of six of its articles of association, and a power of attorney by the corporation, under its seal, dated May 14, 1889. By the latter document very ample powers for the administration of its business in Western Australia are conferred upon three gentlemen, one of whom, Alfred Canning, was appointed as the managing director. All ordinary business between the bank and its customers was transacted by Mr. Canning in that capacity. Mr. Canning had a son, Edmund, who had a separate office of his own, in the same tenement in which the bank had its premises. Canning junior had acted as secretary of the bank during his father's absence from the colony, but his employment ceased upon the return of the latter to the colony in June, 1890. After that date he continued to be confidential agent of his father; and the evidence shews that he was frequently employed by his father to transact business on his behalf as manager with customers of the bank, including the appellant.

The appellant, who resides at a great distance from Perth, went there in the beginning of May, 1891, and called at the bank for the purpose of getting a pass-book brought down to date. He was informed that the manager, for whom he asked, was engaged at the time; but Canning junior, who gave him that information, undertook to have his pass-book made out, assisted in making it up, and subsequently gave it to him. On examination of the book the appellant discovered that cheques

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were entered to his debit which had not been drawn by him, and he communicated the fact to Canning junior, who, a day or two after, told him that these cheques had been forged by Armstrong, and exhibited to him a confession of guilt written by Armstrong, which was dated May 6, 1891. The appellant then said that Canning junior "ought to make the matter known to his directors, and have the man prosecuted." Canning junior thereupon asked him not to make the matter public, assuring him that, if he did so, "the corporation would lose all chance of getting the money back"—that "the man would be arrested, and they would lose the money." He also said to the appellant that "it would nearly kill his old father if I told the directors." Upon these representations the appellant said nothing about the matter to any one.

The jury have found, in answer to question 4, that Canning junior was held out to the public by the bank as their accredited agent, and that he had knowledge of the forgeries before the appellant. These findings have never been objected to, and are now conclusive against the bank. It is obvious that the question of estoppel arising in these circumstances differs widely from the question which was discussed in *M'Kenzie* v. *British Linen Co.* (1) and similar cases. The ground upon which the plea of estoppel rested in these cases was the fact that the customer, being in the exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced. Here, an agent of the bank had earlier and better information as to the forgeries than the customer himself. Had Canning junior's statement to him been confined to the fact that the cheques had been forged by Armstrong, it is hardly conceivable that the appellant would have been under any duty to reconvey to the bank the information which he had received from their own agent. In that case the customer could not have been reasonably held responsible for a failure on the part of the bank's officer to impart his information to the bank, unless he had good cause to suspect that such a breach of duty was contemplated by the officer and assisted in its concealment.

(1) 6 App. Cas. 82.

In their Lordships' opinion, the only question which it is open to the bank to raise upon the terms of the fourth finding of the jury is this—Whether the request for silence, which accompanied the information given to him by Canning junior with respect to the forgeries, was in itself sufficient to impose upon the appellant the duty of taking the unusual step of informing the directors of the course which their agent meant to pursue professedly in the interest of the bank. If that request had been calculated to create, in the mind of a person of ordinary intelligence, a suspicion or belief that the agent, or the ordinary managers of the bank's affairs, meant to betray its interests, their Lordships think it would have been the duty of the appellant to lay the whole matter before the directors for their consideration. But any imputation of that kind is excluded in this case by the sixth finding of the jury, which is also unchallenged, to the effect that the appellant acted honestly and with a view to what he believed to be the interest of the bank. The respondents' counsel were unable to refer to any rule of law which, in the absence of any such suspicion or belief, imposed a duty upon the appellant to carry the information which he had received to the directors of the bank; and it does not appear to their Lordships that any such duty was required of him by the rules of fair dealing between man and man.

Their Lordships have accordingly come to the conclusion that, upon the first six findings of the jury which stand unimpeached, the bank's defence of estoppel fails, and the appellant is entitled to the judgment which was entered for him by the learned judge before whom the case was tried. That result cannot be affected, either by the answers which the jury returned to the remaining three questions, or by any answer which, in the opinion of the Full Court, the jury ought to have given to these questions, which were only designed to raise a replication, on behalf of the appellant, to the bank's plea of estoppel, in the event of its being sustained. But, in view of the arguments which were addressed to them from both sides of the Bar, their Lordships think it right to make some observations upon the three questions, with the responses made

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to them by the jury, which were brought under review of the Full Court.

Having regard to the previous findings of the jury, their answer to the seventh question is in strict logical sequence. If the conduct and silence of the appellant did not constitute a legal wrong, upon which the bank could rely by way of estoppel, there could be no damage or prejudice to the bank. But the answer was treated by the appellant's counsel as affording complete immunity to him, even if the previous findings were construed as raising an estoppel. If the true import of the previous findings had been that, by keeping silence and allowing the forger to escape from the colony and the jurisdiction of its Courts, the appellant had violated his duty to the bank, their Lordships are of opinion that these circumstances would in themselves have been sufficient to shew prejudice entitling the bank to have their plea of estoppel sustained to its full extent, notwithstanding the answer given by the jury to the seventh question. It was argued for the appellant that, under the seventh question, it was open to the jury to find the amount which the forger could have paid under compulsion of law, and to assess the damage sustained by the bank at that sum; and also that the appellant would not have been estopped from alleging forgery of the cheques except to the extent of the damage so found. Their Lordships can only say that, in their opinion, no such finding could have been of the least benefit to the appellant if there had been facts sufficient to raise an estoppel. There are some obiter dicta favouring the suggestion that, in a case like the present, where the amount of the forged cheques is about 1500*l.*, the estoppel against the customer ought to be restricted to the actual sum which the bank could have recovered from the forger. But these dicta seem to refer, not to the law as it was, but as it ought to be; and, in any view of them, they are contrary to all authority and practice.

The eighth and ninth questions practically involve the same issue of fact under different legal appellations, that issue being, whether the bank, after the date of those circumstances which are said to create an estoppel, undertook and agreed to rectify the appellant's account by deleting the forged cheques from

the debit side of it. Their Lordships are of opinion that the answers made by the jury to these two questions are fully supported by the evidence, and ought not to have been set aside by the Court below. Canning senior, who was in reality the bank, received from the appellant on August 25, 1891, a telegram in these terms, "Did you receive a letter from me relative to my account last month? Have received no reply." The letter referred to has not been produced, but, according to the evidence of the appellant, it complained of the forged cheques having been debited to his account, and demanded its rectification—a statement which is entirely consistent with the telegram and with the reply which was sent to it. The reply, which was wired on the same day, August 25, in name of the managing director, was as follows: "Yes, account now all right." It acknowledges receipt of the appellant's letter, and plainly implies knowledge of the request which was made in that letter, and it must not be forgotten that these communications took place long before there was any suggestion that the appellant was estopped from complaining of the forged debits. The explanations given by Canning senior with respect to these telegrams are simply humiliating, and obviously unworthy of credit. He denies having received any letter from the appellant referring to the forgeries, before the receipt of the appellant's telegram of August 25, which he "does not recollect." He admits that he may have told his son to send the reply telegram of the same date; and then he proceeds to explain what he meant by the terms in which the reply was couched. The impression which their Lordships derive from his testimony is, that on August 25, 1895, the manager of the bank was cognisant of the whole matter, and deliberately undertook that the bank would rectify the appellant's account by withdrawing the forged cheques from his debit. He does not venture to deny explicitly, either that he did authorize the telegram in reply, or that he was cognisant of its contents; although he endeavours to evade these conclusions. Their Lordships will only add that, in their opinion, the jury in all probability did not believe the evidence either of Canning senior or of his son; and that, upon their evidence, the jury

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would have been warranted in coming to the conclusion that the father was in the knowledge of Armstrong's forgeries before that fact was known to the appellant.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the Full Court, to restore the judgment entered for the appellant by the judge who presided at the trial, and to order the respondent corporation to pay to the appellant the costs incurred by him in the Courts below, from and after the date of the judgment so restored. The respondent corporation must also pay to the appellant his costs of this appeal.

Solicitors for appellant: *Sharpe, Parker, Pritchards & Barham.*

Solicitors for respondents: *Markby, Stewart & Co.*

[HOUSE OF LORDS.]

AARON'S REEFS, LIMITED . . . . APPELLANTS; H. L. (I.) 1896 April 30.

AND

TWISS . . . . . RESPONDENT.

Company—Prospectus—Fraudulent Misrepresentation—Shareholder—Repudiation by Plea—Forfeiture of Shares—Companies Act, 1867, *c.* 131, *s.* 38.

Where a person is induced by a fraudulent prospectus to apply for an allotment of shares, and his shares are afterwards forfeited by his failure to pay calls, he ceases to be a shareholder and becomes a mere debtor to the company, and if he has done nothing to affirm the contract he may repudiate it and defend an action for calls on the ground of the fraud.

A prospectus which merely specifies the dates of and names of the parties to contracts in compliance with the Companies Act, 1867, s. 38, does not give notice of circumstances contained in the contracts which are material to be known and the omission of which causes the prospectus to give a false impression.

The decision of the Irish Court of Appeal ([1895] 2 I. R. 207) affirmed.

THE following statement of the facts is taken from the judgment of Lord Watson:—

The appellant company was incorporated in January 1890 with a nominal capital of 200,000*l.*, divided into 800,000 shares of 5*s.* each, for the purpose of acquiring the right to work and of working ores, auriferous deposits, and precious stones. In February 1890 the company, under two deeds of purchase, acquired the right to work what is therein described as the mining concession of La Victoria, in the Republic of Venezuela. The price payable for one portion of the concession was 19,000*l.*, and for the other 131,000*l.*; and the company undertook to pay over to each of the vendors a moiety of the moneys received from the public for the subscription of shares until the first of these sums was paid off, and thereafter to pay two-thirds of the moneys derived from that source, in extinction of the balance of 112,000*l.* of the second sum, retaining the other third as working capital.

The concession of La Victoria was well known to many persons who indulge in gold-mining speculations, and among

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them the directors of the new company. One of these gentlemen, who was examined as a witness for it in the present case, gave the following abstract of its history. It was first taken up by the Victoria Gold Company, Limited, which was formed for that purpose in the year 1882, who agreed to pay 100,000*l.* for it, and, after "prospecting for mining operations," went into liquidation in November, 1885. In January 1886 a new company, called Victory, Limited, was formed, and took over the assets and liabilities of its predecessor. The public subscribed for 170,000 of its 5*s.* shares; and the whole subscriptions, amounting to 42,500*l.*, were "spent in the mine." The company paid no dividend, but lasted till the end of 1887, when it was wound up by order of the Court, and its property, including the concession, was sold for 2000*l.* in cash, the purchaser at the same time undertaking liabilities to the amount of 8000*l.* A month afterwards a new company, the Victory or Victoria Company, Limited, was started, which is said to have taken over the concern from the last purchaser, giving him in exchange 3910*l.* in cash and 131,000*l.* in paid-up shares, besides assuming the liabilities which he had undertaken. The third company did not, like its unfortunate predecessors, find its way into liquidation. So far as appears, it neither spent money in prospecting nor in attempting to work or develop the mine; and the only profitable business it seems to have engaged in was when its leading spirits got up the present and fourth company, and proceeded to transfer the concern to it at the price of 150,000*l.*, to be paid in hard cash out of the money to be subscribed by the new shareholders.

In February 1890 the appellant company issued a prospectus, on the faith of which the respondent in this appeal, an Irish gentleman residing in Limerick county, became a subscriber, on the terms it offered, for 100 shares. The prospectus invited subscriptions for 200,000 shares only, upon which a deposit of 1*s.* per share was to be paid, and no further call made during the year. The shares were allotted to the respondent, who paid the deposit money.

On March 5, 1891, after the expiry of the year, the company made a call of 4*s.* per share, payable on the 19th of that month.

The respondent did not comply with that request, and on April 27 he received an intimation that his shares would be forfeited if payment were not made on or before May 4. On May 5 notice was sent him that the shares had been forfeited. The articles of association provide that a member whose shares are forfeited shall nevertheless remain liable for calls previously made.

On September 21, 1891, the appellant company brought the present suit against the respondent, before the Exchequer Division of the High Court of Justice in Ireland, for recovery of the call of 4*s*. per share. The defence, which was delivered on December 21, 1891, substantially consisted in the allegation and plea that the prospectus was untrue in material respects, and that his contract to take shares, having been induced by fraud, could not be enforced. In the voluminous proceedings which have followed upon these pleadings the appellant company has traversed the allegations of fraud, and has also maintained that the respondent is estopped from challenging the validity of the contract by reason of his failure, within a reasonable time, to repudiate it, or to take steps for procuring its rescission.

At the trial of the cause before Holmes J. the jury found (1.) that the fact and terms of the sale by the Victoria Gold Mining Company to the City Stock Exchange Company, and of the resale of the last-named company to the plaintiff company, were material matters which ought to have been disclosed in the prospectus; and (2.) that these matters were not disclosed in the prospectus, with the fraudulent intent of concealing from persons reading it matters which if known would have prevented them from becoming shareholders, and of inducing them by such concealment to apply for shares. The jury also found (5.) that the defendant was induced to apply for the allotment of shares by the prospectus, and (7.) that the statement that the mine had been proved "rich" in the prospectus was false. There are other findings of the jury, none of them favourable to the company, which I do not find it necessary to consider for the purposes of this appeal.

After verdict, the judge who presided at the trial entered

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judgment for the respondent. A motion to set aside the verdict was thereafter dismissed unanimously by two learned judges of the Exchequer Division. The Court of Appeal was equally divided (1), the Lord Chancellor and the Master of the Rolls being of opinion that there was neither untruth nor fraud in the prospectus, and also that, if there had been, the respondent would have been barred from objecting to the validity of his contract to take shares by his own delay in repudiating it; whilst FitzGibbon and Barry L.JJ. took an opposite view upon both these points. The Court being equally divided, the order was that the order of the Exchequer Division do stand affirmed. Against these decisions the plaintiffs brought the present appeal.

April 24, 28. *Levett Q.C.* and *Edward Ford* for the appellants. There has been no misrepresentation of fact—there is the gold if there is money to work it. The company believed in the mine, and did not mislead the shareholders. Even if they failed to disclose all the facts, the non-disclosure was not fraudulent unless an obligation to disclose is proved; and there is no obligation to do more than the statute (Companies Act, 1867, c. 131, s. 38) requires, namely, to give the names of the parties to and the dates of contracts. In an action of deceit there must be a fraudulent misrepresentation unambiguous in meaning: *Smith* v. *Chadwick*. (2) There was no real finding of false statements by the directors.

Further, if there were fraudulent misstatements, the respondent ought to have exercised his right of avoidance at once: *Taite's Case*. (3) He was too late, and the rights of third parties have intervened. No ground is shewn either for an action of deceit or for the return of the purchase-money.

[LORD HALSBURY L.C. referred to *Clarke* v. *Dickson* (4), and LORD DAVEY to *Peek* v. *Gurney*. (5)]

Ronan Q.C. (of the Irish Bar), *Carson Q.C.* and *W. R. Edwardes*, for the respondent, were not heard.

(1) [1895] 2 I. R. 207.
(2) 9 App. Cas. 187.
(3) L. R. 3 Eq. 795.
(4) E. B. & E. 148.
(5) L. R. 6 H. L. 377.

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April 30. LORD HALSBURY L.C. My Lords, this is an appeal from an order of the Court of Appeal in Ireland affirming an order of the Exchequer Division refusing to set aside the findings, verdict, and judgment entered for the defendant (the respondent at your Lordships' bar) at the trial of the action. It was an action in respect of calls on shares. The defendant in the action succeeded in having the judgment entered for him, and the appeal is now brought claiming that the judgment shall be entered for the plaintiffs notwithstanding certain findings of the jury, to which I shall refer presently.

My Lords, the action was brought by the company, who are appellants, in order to recover a certain amount of calls. So far as the pleadings are concerned, they become immaterial in themselves considering what has passed at the trial, but, nevertheless, they may be important to be looked at for the purpose of seeing what was the question which was properly open upon the record, and in what way, notwithstanding the findings of the jury, the plaintiffs contend that they are entitled to judgment.

My Lords, the short case of the defendant was that he was induced to enter into the contract upon which he was sued by fraud of the plaintiffs, and that fraud consisted in fraudulent representations made in the prospectus by which he was induced to become a shareholder. My Lords, I think some little doubt was entertained during the progress of the argument as to whether the plea of fraud could be relied upon, having regard to the allegation that the status of shareholder acquired by the person who subscribed to the shares threw upon him the necessity of shewing that he had not adhered to the contract, and that, notwithstanding the fraud, he must do that which in him lay to get rid of the character of shareholder in order to enable him to avail himself of the plea of fraud. I did not very clearly follow at the moment how that arose, but I see that the same question arose in a case in the Court of Queen's Bench, and it is instructive, not with reference to the mere question of the fraud here, but with reference to the state of the law which it discloses, to see how that question was dealt with. In that case, as in this, the action was for calls, and the defendant had

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pleaded simply that the contract was obtained by fraud. The judgment of the full Court of Queen's Bench gives the reason why that plea, without setting out what is put forward in this plea, was a bad plea: *Deposit Life Assurance Co.* v. *Ayscough*. (1) It was there contended, as at one time I thought it might be contended here, that a simple plea of fraud was enough—that, as the plaintiffs were suing upon a contract, it would be enough to say that the contract was obtained by fraud. But the learned judges point out that the action was brought in pursuance of the statute 7 & 8 Vict. c. 110, s. 55, which provides that where a call has been made by a company "it shall be sufficient to state only that at the time of the commencement of the suit the defendant, as the holder of certain shares . . . . in a certain company or undertaking, as the case may be, . . . was indebted to the company in a certain sum . . . . for certain instalments of capital then due and payable in respect of the said shares, and that the defendant hath not paid the same," and that if it be proved upon the trial of any such action "that the defendant was the holder of any share when such instalments, or any of them, in respect of the same, and for which the action is brought, became due, then such company shall recover such instalments." The answer made to the simple plea of fraud is very compendiously given by Crompton J. in the course of the argument. He says: "When the record shews that the contract has been executed so far that the defendant has received a benefit, I have doubted whether in an action on the contract, the plea of fraud must not shew that he has restored what he has received. But this action is not upon the contract; it is given by statute 7 & 8 Vict. c. 110, s. 55, against the holder of shares; and your plea is not good unless it shews the defendant not to be the holder of the shares. He is the holder at least till he disaffirms, though he became so in consequence of fraud." Upon that ground the plea was held bad.

My Lords, in the case before your Lordships, therefore, it must be taken that that was an essential part of the plea; but although the learned judge has reserved all power of amendment in the pleadings not inconsistent, of course, with the findings

(1) 6 E. & B. 779.

of the jury, I do not see how that case can now be set up on the part of the plaintiffs. There is here neither evidence, nor, so far as I can see, any contention that the defendant had adhered to the contract.

My Lords, I want to clear away one or two other questions which have been raised, and in particular the quotation from an unreported judgment of Chitty J., not upon the facts, which are absolutely irrelevant here, for we have nothing to do with any facts except such as are proved here. I observe that Chitty J. used this language, and I see it is quoted by some of the learned judges below as justifying the view they entertained in favour of the plaintiffs. The words are: "Bold promoters seem to rely upon the public not asking to see contracts referred to in the prospectus and to know the law that those who take shares on the faith of a prospectus which refers them to the contracts cannot complain on the ground of ignorance of what is to be found in them." My Lords, that, parenthetically put as it is, seems to import that such is the law. That has been decided not to be the law by the Court of Appeal, presided over at that time by Sir George Jessel, and by this House. My Lords, that very argument was used before Sir George Jessel in the case of *Redgrave* v. *Hurd* (1), and in a very luminous judgment he disposed of that argument absolutely. He said: "There is another proposition of law of very great importance which I think it is necessary for me to state because, with great deference to the very learned judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations. That of course is quite a

(1) 20 Ch. D. at p. 13.

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different thing. Under the statute, delay deprives a man of his right" on other grounds.

Then, my Lords, such being the state of the authorities, the case of the *Central Ry. Co. of Venezuela* v. *Kisch* (1) in your Lordships' House seems to me to reduce this matter to but a very small point. The question of the reference to contracts is referred to in that case, and it is stated in broad terms that a mere reference to a contract existing in a prospectus is not notice of a contract, and cannot be set up by a person who has been guilty of inducing another to enter into a contract by false representations. My Lords, if that is the state of the law and of the pleadings, this case is reduced to a very small compass. Was there evidence for the jury that this contract was obtained by fraud of the plaintiff company? And was there evidence for the jury of the falsehood of the statements which are contained in the prospectus? My Lords, I cannot entertain the smallest doubt upon either of those questions. With reference to the first, whether the contract was obtained by fraud of the company, assuming there to be a fraud (a matter with which I will deal in a moment) I cannot entertain the least doubt that this was a very fascinating prospectus: there were statements in it which I will deal with more particularly hereafter, but they were statements calculated to shew that it was a very good thing—that it was a commercial adventure which was likely to produce very large profits, perhaps not 100 per cent., but at all events large profits. But I must protest against it being supposed that in order to prove a case of this character of fraud, and that a certain course of conduct was induced by it, a person is bound to be able to explain with exact precision what was the mental process by which he was induced to act. It is a question for the jury. If a man said he was induced by such and such an inducement held out in the prospectus, I should not think that conclusive. It must be for the jury to say what they believed upon the evidence. Looking at the evidence in this case, I should say if I were a juryman that this was a very fascinating prospectus, and was

(1) L. R. 2 H. L. 99.

calculated to induce any one who believed the statements in it to invest his money in the concern.

Then, inasmuch as the jury have found that, I think, upon very good evidence in the prospectus itself, it remains only to consider the final question, namely, whether or not there was evidence for the jury which would justify them in finding that this was a fraudulent prospectus—that these statements were fraudulent and false. Now, in dealing with that question, again I say I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together. Now, if you look at the whole document taken together, knowing what we now know and what the jury had before them, I suppose nobody can doubt that this was a fraudulent conspiracy. I observe that one or two of the learned judges below used very plain language upon it, and remarked upon the fact that Mr. Gilbert, who seems to have been the head and front of it, was not subjected to an inquiry in a criminal court. But, be that as it may, the question before your Lordships now is whether the jury were justified in finding with these facts before them what they did find.

It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there false representation? I do not care by what means it is conveyed—by what trick or device or ambiguous language: all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in shewing that any specific statement is untrue.

But I do not shrink from the question whether any of these statements are untrue. I think some of them are absolutely untrue. I will take one or two for example, although I think that the whole thing exhibits falsehood. I observed in the prospectus there is a statement to the effect that reports of the

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most favourable character had been made upon this mine. That is not true. I only mention it in passing—I do not propose to rely upon it. The reports were made in respect of another company, and made some of them eight or nine years before. That is untrue, and, of course, even assuming what I shall deal with in a moment and what the words "proved to be rich" may imply—assuming that there had been an inquiry into the state of the mine, a prospecting, as it is called, eight or nine years before—to treat that as something which had happened at the formation of this company is of itself a gross misrepresentation. Much may have happened in the eight or nine years intervening; and we now know as a fact that much did happen in those eight or nine years, shewing that, whatever opinion might reasonably have been entertained eight or nine years before, there was no ground for thinking that such a belief would have been entertained by skilled persons if they had just been inquiring into the state of this concession at the time when the company was formed.

But, my Lords, it is said that there is no proof that this mine was not "proved to be rich," which is one of the material allegations. My Lords, I do not understand in what way it is suggested that the word "proved" is to be used. I observe that one of the learned judges (the judge who tried the cause) seems to think that there is no middle course between an actual working of a mine, the production of metal in it, and what he describes as "prospecting." I venture to differ from that view. The word "proved" is not a word of art. It might be proved in many ways. But what proof or pretence of proof was there here? It is said, "Oh, the mine is very rich still—at all events, you did not give any evidence that it was not"; but if there is this evidence, that three companies have tried to work it and have failed, can anybody say that that reflects no light upon the richness or comparative poverty of the mine? I should have thought it was ample evidence. Some comment has been made upon the absence of cross-examination on the subject. I should have thought for myself that it would have been very rash for those who had no means of contradicting anything that was said to cross-examine persons who had, by

the hypothesis, not many scruples as to what they might say, and that it was far wiser (it seems to have been successful) to leave the statements which they chose to make to be judged of by the jury. I think that the result shews that the learned counsel who conducted the case for the defendant were wise in the discretion they exercised. But still the question comes back to this: What was it that the jury had before them which was such evidence as entitled them to say that this mine was proved not to be rich? I protest against its being supposed that the only source of evidence of that sort is to be the evidence of somebody who goes down and examines the mine. The result of actual experience, the failure to make it available as a commercial adventure, is good and cogent evidence that the mine itself was not what it was represented to be in the knowledge of those who were putting forth this prospectus.

But further than that, I wish to say for myself I do not think any particular form of words is necessary to convey a false impression. Supposing a person goes to a bank where the people are foolish enough to believe his words, and says, "I want a mortgage upon my house, and my house is not completed, but in the course of next week I expect to have it fully completed." Suppose there was not a house upon his land at all, and no possibility, therefore, that it could be fully completed next week, can anybody say that that was not an affirmative representation that there was a house which was so near to completion that it only required another week's work upon it to complete it? Could anybody defend himself if he was charged upon an indictment for obtaining money under false pretences, the allegation in the indictment being that he pretended that there was a house so near completion that it only required a week's work upon it, by saying that he never represented that there was a house there at all? So here, when I look at the language in which this prospectus is couched, and see that it speaks of a property which requires only the erection of machinery to be either at once or shortly in a condition to do work so as to obtain all this valuable metal from the mine, it seems to me that, although it is put in ambidextrous language, it means as plainly as can be that this

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is now the condition of the mine, that such and such additions to it will enable it shortly to produce all those great results, and that that is a representation of an actually existing fact. I should quite agree with the proposition that the Lord Chancellor of Ireland and the Master of the Rolls put forward—if you are looking to the language as only the language of hope, expectation, and confident belief, that is one thing; but it does not seem to have been in the minds of the learned judges that you may use language in such a way as, although in the form of hope and expectation, it may become a representation as to existing facts; and if so, and if it is brought to your knowledge that these facts are false, it is a fraud.

My Lords, as to the rest of the case, if there was evidence for the jury no one can doubt that the jury were right in coming to the conclusion to which they came. The whole of this transaction seems to me to have been fraudulent to the last degree, and I entirely concur with those learned judges who, in very plain language, said that the persons engaged in this transaction were guilty of a fraudulent conspiracy, and might have been indicted for it.

The other question which is raised here has reference to the financing of the company. Without troubling your Lordships with quoting it at length, I observe that, curiously enough, in the case of the Venezuelan Company (1), in your Lordships' House, the very same argument that was used in this case was presented to the House at that time. It was said there that the money asked for was for the purpose of making a railway, and the mode in which the company carried on its business was suggested to be that an amount was to be spent upon the railway, or had been spent upon the railway. And the very identical words, I think, were used there by counsel to the House presided over by Lord Chelmsford, that people could not have been so stupid as to suppose that they would get a present of a concession, and that, therefore, a large deduction must be made for the money that would have to be paid for the concession. Lord Chelmsford deals with that argument, and he says, "What you have said is that this money was to be used

(1) L. R. 2 H. L. 99.

for that purpose." There was there, as here, a very large debt, and it was held to be a fraud just on the same ground on which I think your Lordships will hold this to be a fraud. It was contended that the condition of things was such that the money could not be applied for that purpose, and Lord Chelmsford says: "Whether it was the case or not that the concession could be obtained for nothing I am sure I do not know: there is nothing inconceivable in the idea that the Venezuelan Government might have given a concession, and given it for nothing; and you are not to assume that the meaning of the language was different from its primâ facie impression."

Now, my Lords, in this case can anybody doubt what the condition of things was? It was a device or expedient for the purpose of dividing amongst these persons the money they were getting from the public upon the false colour and pretence that it was going to be used upon the development of this mine. I have some difficulty in referring to the correspondence, except the two letters that are certainly in evidence. I am reluctant to refer to anything that I do not find in evidence. Those two letters, however, are pregnant in what they prove with respect to what was actually going on in the mine. Mr. Nicholls, for whose honesty Mr. Levett expressed a somewhat strange admiration, said that he was anxious to withdraw the men from the mine—there were only two men there. There follows a correspondence, and upon that correspondence it seems to me that what was going on beyond doubt was this: there was to be an allegation which was reconcilable with the truth, which was to be told to this extent. If it was asked, "Are there men at work?" the answer would be, "Yes, there are two men at work on the raising, and one man directing." The object of that was to produce an impression in the London market that this was a mine which was at work, and of a very valuable character. Mr. Nicholls desires to withdraw a man, and then follows a letter which is certainly in evidence, which shews what was the object of this whole transaction.

My Lords, it seems to me it would be the strangest and most lamentable failure of justice if, with these facts proved

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and found by the jury, the plaintiffs could, notwithstanding these facts, succeed in enforcing the contract.

For these reasons, my Lords, it appears to me that this appeal ought to be dismissed with costs, and I so move your Lordships.

LORD WATSON (after stating the facts given above). My Lords, Mr. Levett and Mr. Ford said everything that could possibly be urged on behalf of the appellant company; but after hearing them, I found it impossible to differ from the opinion of the great majority of the Irish judges. I think that the findings of the jury which I have already noticed, although the first two of them are peculiar in their form, are not only intelligible, but are reasonable, and are fully warranted by the evidence in the case.

The personal knowledge which its framers had of the antecedents of the Victoria concession must have made it a difficult, if not an impossible task for them to prepare a prospectus which would be attractive without being dishonest. They apparently succeeded in making it attractive; but in doing so they appear to me to have come a long way short of common honesty. The substance of the representations conveyed by it is, that the property acquired by the company had already been proved to be rich in gold, and only required the erection of machinery (tenders for which were about to be invited) in order to be *at once* in a position to make returns; that it was proposed to erect a forty-stamp mill in the first instance, and to make additions from time to time; that an average yield of 1½ ounces per ton would give a monthly return of 3600 ounces of gold per month, value nearly 14,000*l.*, the greater part of which would be available for distribution as dividends, and that it was not unreasonable to anticipate that the mine would readily and speedily pay dividends to the extent of 100 per cent.

The prospect of becoming interested in a rich mine of gold which was to make returns at once, with the probable result of yielding a handsome dividend although it should not nearly approach to cent. per cent., was very alluring. If the readers of the prospectus had known that of the 10,000*l.* which they

were asked to contribute during the coming year not one sixpence would be available for working the mine, that there would be no money available for that purpose until 38,000*l.* of calls had been paid, and that thereafter, until a further sum of 112,000*l.* had been paid, only one-third of the subscriptions or calls received by the company would be available, I think they would have taken a much less sanguine view of the situation. It was argued for the company that, inasmuch as its contracts for the purchase of the concession are generally referred to towards the end of the prospectus, the respondent must be held to have had notice of their contents. That appears to me to be one of the most audacious pleas that ever was put forward in answer to a charge of fraudulent misrepresentation. When analyzed it means simply that a person who has induced another to act upon a statement made with intent to deceive must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document, the perusal of which would have exposed the fraud. The extravagance of the plea in the present case is not lessened by the fact that the respondent had no right of access to the document, and that it is clear that he was neither invited nor expected to examine it.

The expression "material matters" which occurs in the first two findings of the jury is one which might in some cases require serious consideration. The duty of disclosure is not the same in the case of a prospectus inviting share subscriptions as in the case of a proposal for marine insurance. In an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers might be of opinion that these would have been of materiality as influencing the exercise of their judgment. But the statement of a portion of the truth, accompanied by suggestions and inferences which would be possible and credible if it contained the whole truth, but become neither possible nor credible whenever the whole truth is divulged, is, to my mind, neither more nor less than a false statement. It was in that sense that the jury affirmed the suppression of all information with respect to the purchase of the concession to be material and fraudulent; because they thought, as I do, that such suppression was necessary in order

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to enable the company to manufacture a tempting bait for the unwary, and to submit to them a prospectus which was neither true nor honest.

As already stated, I am also of opinion that the finding, to the effect that the statement in the prospectus "that the mine had been proved rich" was false, was reasonable and was warranted by the evidence; and if so it was unquestionably calculated to deceive, being the very basis upon which the representations made as to the prospects of the mine and its anticipated returns are reared. It appears to me to be proved by the evidence that, not only was the statement false, as found by the jury, but that it was known by the framers of the prospectus to be so. There are no less than twelve reports quoted in the prospectus, which are now relied on as evidencing the large proportion of gold to be found in the quartz rock of the concession, one of these being mere hearsay of somebody else, and another anonymous; only one of the remaining ten purports to contain an assay of samples, which was not made by the writer of it, the writer himself being one of the directors of a defunct company who failed to make the mine pay. No date is attached to any of these reports; but it appears from the evidence of Robert Larchin, a director of the appellant company until March, 1892, that they were all written before December, 1887, when the second company went into liquidation. They bear internal evidence (and there is no proof to the contrary) of having been prepared for no other purpose than that of influencing the share market; and the framers of the prospectus of 1890 were perfectly aware that the brilliant predictions in which they abound had been falsified by experience. Accordingly the appellant company had hardly been formed before they began to press John Nicholls, who had been employed by their predecessors and whom they continued to employ at the mine in Venezuela, for a favourable report of the auriferous qualities of the quartz. They received from him in February the gratifying assurance that he actually had in his possession "several pieces shewing visurable gold," and also that he "saw gold in several pieces of quartz." In April 1890 further pressure elicited from the same servant the information that "Mr. Fenn is testing some

of the quartz from the Arran Reef and some from the Howard Reef." Of the results of that testing nothing was heard at the trial. During the same month Nicholls reported that he had met with "small seams of quartz shewing a little gold by panning"; and in May he further reported that he had "found specks of gold by panning." Not being altogether satisfied with the tenor of the communications which they had received from Nicholls, the company wrote to him on September 16, 1890, "You must keep two men working on the drive, don't forget, at any cost. It is most important to have something coming forward as to work being done, and I think you will cut the lode first here." The letter produced the following reply by wire: "We have struck a well defined lode." The reply was probably not considered satisfactory, as nothing was heard at the trial of any gold being found in the "well defined lode."

The respondent did not remit the deposit payable in respect of his 100 shares or obtain an allotment of them until September 1890. Even if the company believed (which in my opinion it did not) in the truth of the representations made in its prospectus with regard to the richness of the mine, it is too heavy a draft on my credulity to suppose that it continued to entertain that belief in September 1890. In that case its acceptance of the respondent's money and the issue of shares to him, without any explanation of what had come to its knowledge since the date of the prospectus, was neither more nor less than a fraud. The truth is that the whole circumstances of this case are redolent of fraud; and I should have been surprised if the jury had come to any other conclusion than that which is embodied in their verdict.

The question remains whether the respondent was not entitled to challenge the contract under which he became a member of the company by reason of his having unduly delayed his repudiation. I venture to think, with all deference, that the reasoning of the Lord Chancellor of Ireland and the Master of the Rolls upon this point is founded upon a misapprehension of the law. The authorities relating to rescission by the member of a registered company with the view of having his name removed from the list rest upon considerations which involve the interests

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of creditors of the company, or of his socii; and they have no application to the present case unless it is shewn that on May 5, 1891, the respondent had lost his right to escape from the liabilities of a shareholder on the plea that he had been fraudulently induced. Accordingly, the argument of counsel for the appellant company was, very properly, maintained before us upon the footing that on or before May 5, 1891, the respondent could not have succeeded in a suit to have his name removed from the register of the company. In the absence of a liquidation order, or any equivalent, that argument necessarily rested upon the assumption that the respondent was before that date in the knowledge of the fraud which had been practised upon him. The main defect of the argument consists in the want of any foundation in fact. There is not a tittle of evidence tending to shew that the respondent had such knowledge. It is true that in answer to a letter of March 10 he had been furnished with the names of the directors of the company, which put him upon his inquiry; and also that before May 6 he had formed a shrewd suspicion that he had been the victim of a fraud. But the whole weight of the evidence supports the conclusion that, until he had an opportunity of examining the documents produced in this suit, he knew of no tangible grounds for disputing the validity of his contract with the company.

In that state of matters the forfeiture of his shares on May 5, 1891, remanded him and the company to the common law relation of debtor and creditor, which, in so far as concerns the right of rescission, was thus defined by the Exchequer Chamber in *Clough* v. *London and North Western Ry. Co.* (1): "We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind." In this case it cannot be affirmed that the respondent had indicated his election to be bound by the contract, or that any innocent third party had acquired an adverse interest, or that the wrong-

(1) L. R. 7 Ex. 35.

doer had been prejudicially affected by his delay. It must also be kept in view that the respondent is not seeking to rescind the contract: he is merely resisting its enforcement by the party guilty of the fraud.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL. My Lords, if it were not for the fact that two of the learned judges in the Court of Appeal in Ireland have taken a different view, I should have said that this was a very clear case; and I think that they have been misled by not sufficiently considering that the question to be determined was what idea would be conveyed to an ordinary man by a perusal of this prospectus, viewing each statement contained in it in the light of the other statements to be found there. The only point to be determined is, was there evidence upon which a jury could properly find that the prospectus contained false statements? They have found that the prospectus contained statements not only false, but fraudulent to the knowledge of those who made them. It appears to me that there was ample evidence of this. I do not propose to enter in detail into the facts of the case, because they have been dealt with at large by my noble and learned friends who have preceded me, and I should only needlessly delay your Lordships if I were to do so.

With reference to the point of the defendant being too late to repudiate, I entirely concur in the view of the law which has just been put before your Lordships.

LORD MACNAGHTEN. My Lords, I am of the same opinion. To my mind the case is so clear and the judgment of Fitz-Gibbon L.J. is so complete in all respects and so convincing, that I only propose to add a very few words.

The prospectus in my view is not only a dishonest prospectus, but it is, I think, one of the most dishonest documents of that class I have ever seen.

The case presented to your Lordships is an extremely simple one. A jury has found that the contract on which Captain Twiss is sued was induced by fraud, and particular instances

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of the fraud are specified. Is there any reason to displace the verdict?

In the first place, the jury has found that the two contracts with the company which styled itself the City Stock Exchange Company were material to be disclosed and were fraudulently concealed. Can there be any doubt about either of those propositions? The prospectus invites the public to subscribe to a first issue of shares in a mining company. The issue was of a substantial amount—and the prospectus represents most clearly that with the proposed subscription the company would go to work at once with every prospect of earning handsome dividends on the shares of that particular issue and without asking the public for more money. The two contracts tell a different story. The design was to obtain not a subscription towards a mining adventure, but a subvention in aid of a set of fraudulent adventurers. The gentleman who prepared the prospectus with the help of the person who was apparently both the inventor and the proprietor of the City Stock Exchange Company admits that "there could be no money available for working purposes out of the first issue of 200,000 shares." In the finding on this head the learned judge who tried the case concurred.

Then the jury found that the statement in the prospectus that the property had been "already proved rich" was false. If that statement was false it must have been false to the knowledge of the promoters. The learned judge thought there was no evidence in support of the finding. I think there was ample evidence to support it. I do not think that the statement was intended to mean that the mine was proved rich by what had been discovered in the usual course of prospecting. I think it was intended to mean much more than that. Mr. Larchin, one of the two directors whose names are on the prospectus, puts himself forward as "Director, Victory Gold Mining Company." The prospectus states that the property to be acquired by the Aaron's Reefs formed part of "the well known mining property of the Victory Gold Mining Company." The person who makes the only report set out in the prospectus which is up to date is described in the heading of his report as "Superintendent of the Victory." Almost all the reports

represent that the great lode in the Aaron's Reef property, the champion lode, as Mr. Nicholls calls it, was the same as that on the property retained by the Victory Gold Mining Company, only perhaps better. I think that the statement that the property had been already proved rich, taking all the statements in the prospectus together, was intended to mean that it had been proved rich through its connection with the Victory Gold Mining Company—a company which under various transformations had, as the Lord Justice observes, beggared everybody who had undertaken the experiment of working the property.

On the other point also I agree with FitzGibbon L.J. It is quite plain that up to the time when his shares were forfeited the respondent did not know, and had no means of knowing, the fraud that had been practised upon him. Before the action the respondent appears to have heard rumours that the company was a swindle; but he had no certain information on which he could act. The fraud was not disclosed until the trial of the action. After the respondent's shares were forfeited he ceased, as the Lord Justice observes, to be a shareholder, and became merely a debtor. After that date it was not, in my opinion, incumbent upon him to take any active step to avoid the contract. He was perfectly justified in waiting the company's attack.

I am, therefore, of opinion that the appeal must be dismissed with costs.

LORD MORRIS. My Lords, I concur, and I adopt in its entirety the judgment of FitzGibbon L.J. in the Court of Appeal in Ireland.

LORD DAVEY. My Lords, I also concur in the opinion of your Lordships that the judgment appealed from should be affirmed. I adopt the reasons which have been so fully and clearly stated in the judgment of FitzGibbon L.J., and the reasons which have just been given by your Lordships. In particular I agree that giving the names and dates of the contracts in compliance with the statute did not give notice of circumstances which apart from the statute were material to

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be stated, and the omission of which made the statements in the prospectus untrue, or at least calculated to give an erroneous impression.

I do not desire to add anything on the question whether the respondent was induced by fraud to become a shareholder of this company, or was entitled to repudiate the contract. I will only say a few words on the question whether he has lost his right to repudiation by unreasonable delay.

I entirely agree in the observations of the Court of Exchequer Chamber delivered by Mellor J. in the case of *Clough* v. *London and North Western Ry. Co.* (1), to which I may add the judgment delivered by Lord Selborne in the Privy Council in *Lindsay Petroleum Co.* v. *Hurd.* (2) "The question is," to quote Mellor J., "has the person on whom the fraud was practised having notice of the fraud elected not to avoid the contract? or has he elected to avoid it? or has he made no election?" Lapse of time without rescinding will furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends upon the particular circumstance of the case and the nature of the contract in question. Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation for this reason: the presence of his name on the register may have induced other persons to give credit to the company or to become members of it. "If a man claims," says James L.J., "to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claim to relief": see *Sharpley* v. *Louth and East Coast Ry. Co.* (3) In *In re Scottish Petroleum Co.* (4) Baggallay L.J. expressed a doubt whether the delay of even a fortnight in repudiating the shares after the shareholder was fully informed of all the circumstances and no further investigation was necessary would not be fatal. The point was not,

(1) L. R. 7 Ex. 26.
(2) L. R. 5 P. C. 221.
(3) 2 Ch. D. at p. 685.
(4) 23 Ch. D. 413, 434.

however, necessary to the decision of that case. It may be observed that in the Court of Chancery and the Chancery Division questions of this kind usually arise in suits to rescind the contract where the shareholder is plaintiff. In those cases laches or lapse of time is treated as a defence, and requires to be alleged and proved by the defendant.

In this case the circumstances are very special. Neither party seems to have cared to ascertain exactly when the respondent ascertained the facts upon which he relies for his right to repudiate his shares. He apparently discovered something in March; but no cross-examination was directed to ascertain what he discovered, or when he ascertained the facts on which he now relies, and no finding of the jury was asked for by the plaintiffs on that point. But the matter does not rest there. On April 27, 1891, the respondent's shares were declared to be forfeited, and on May 5 he received notice of the forfeiture. The company thereby severed the relation between themselves and the respondent as shareholder, and the respondent became a mere debtor to the company. It is not proved by any evidence that the respondent had lost his right to repudiate at the date of the notice; and I think that, not having done any act to affirm the contract, he was not then bound to take any step for the mere purpose of getting rid of his liability to pay this call. But I am also of opinion that if the appellants had intended to rely upon the delay they ought to have cross-examined the respondent for the purpose of ascertaining when he learnt the facts, and to have asked for a direct finding of the jury on the subject.

I am therefore, my Lords, of opinion that the appeal should be dismissed.

Orders appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 30, 1896.

Solicitors for appellants: *Chave & Chave.*
Solicitor for respondent: *E. J. Bellord.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 May 5.

THE OVERSEERS OF THE POOR AND CHAPELWARDEN OF THE ROYAL PRECINCT OF THE SAVOY IN THE COUNTY OF LONDON . . . . . } APPELLANTS;

AND

THE ART UNION OF LONDON . . . RESPONDENTS.

Poor-rate—Exemption—Society instituted for purposes of the Fine Arts exclusively—"Voluntary Contributions"—6 & 7 Vict. c. 36, s. 1.

A society is not "supported by voluntary contributions" within the meaning of 6 & 7 Vict. c. 36, s. 1, when it returns to every contributor the equivalent of his contributions in money's worth. "Voluntary" as there used does not mean not compulsory; it means gratuitous, without any money or other merely material consideration.

The decision of the Court of Appeal ([1894] 2 Q. B. 609) reversed and the decision of Wright and Collins JJ. restored.

A SPECIAL case stated under 12 & 13 Vict. c. 45, s. 11, contained in substance the following facts.

The appellants (hereinafter called "the Society") were established in 1837 for the "general advancement of the fine arts and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally." On December 1, 1846, they were incorporated by Royal Charter. Under the charter the property of the Society for the time being, and the management and superintendence of its funds and affairs, are vested in a council of members consisting of a president, vice-presidents, secretaries and certain elective members; and the council is empowered to make by-laws for the regulation of the Society and the admission of members and the management of its estates, goods and business and otherwise, and the services of the members of the council are thereby directed to be honorary. General meetings of the members of the Society for the distribution of prizes (being such prizes as are hereinafter mentioned), receiving the report of the

council and ratifying the election of members thereof are also provided for, and the charter contains a declaration that all works of art selected or given as prizes in each year shall be exhibited in some convenient place in the metropolis and that the members of the Society shall have free access to the same under such regulations as shall from time to time be made. By the Society's by-laws the object of the Society is stated to be the general advancement of the fine arts and the promotion of a greater knowledge and love of the arts of design on the part of the public generally, and to give encouragement to artists beyond that afforded by the patronage of individuals, and to carry out such public encouragement of the fine arts in good faith according to the provisions of 9 & 10 Vict. c. 48 intituled "An Act for legalizing Art Unions," and not to advance private or individual trading, gain or profit. One of the by-laws (passed and added to the by-laws on May 30, 1892) provides that the Society shall not make any dividend, gift, division or bonus in money unto or between any of its members. No dividend, gift, division or bonus in money unto or between any of the members of the Society is in fact ever made. Membership of the Society is confined to subscribers. Subscribers of one guinea or upwards become members for the year for which the subscription is paid and subscriptions may be paid in advance. Membership can at any time be determined by failure to continue the subscription.

Under the by-laws as revised on May 30, 1892, it is provided by the 25th by-law that—"A reserve fund for the purpose of assisting in carrying out the objects of the Society shall be formed by a reserve of not less than 2½ per cent. of the amount of each annual subscription and by the sums not expended by prize-holders in the purchase of works of art as also by the interest dividends and annual produce of the funds and property of the Society." And by the 26th of the same by-laws it is provided that—"The reserve fund shall be applied by the council in such manner as may appear to them most desirable for carrying out the objects of the Society." In 1877 the sum of about 17,000*l.* out of the reserve fund was expended in acquiring and building the premises No. 112 Strand.

Save as aforesaid, the proportion of subscriptions for each

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year constituting the reserve fund and all sums falling into the reserve fund as hereinafter mentioned have under the direction of the council been and are now mainly applied together with the remainder of the subscriptions in the purchase of works of art as hereinafter mentioned, and the accumulations of the reserve fund are now entirely represented by (in addition to the Society's premises) the stock of works of art in the possession of the Society. It has been and still is the practice of the Society to draw on the reserve fund for the purpose of meeting payments which the balance of subscriptions for the time being received by the Society may be insufficient to meet, such sums being raised by means of a loan from the Society's bankers on the security of the lease of the premises.

It is provided by the by-laws of the Society that the subscriptions for each year after paying rent, taxes, salaries and other necessary expenses of the year and after providing for the reserve fund shall be devoted to the purchase of pictures, drawings, enamels, sculpture, medals, engravings or other works of art, and the subscriptions together with the reserve fund are in fact so applied. The works of art so purchased include every year one work of art or the copyright of one work of art (hereinafter called "the annual work of art") engravings or copies whereof are procured by the Society to be made or executed and are distributed as hereinafter appears. Numerous other works of art are from time to time purchased by or executed under the orders of the Society. All works of art acquired by the Society (except such as may from time to time be presented to them) are selected and purchased by, and all contracts for the execution of works of art or of engravings or copies thereof are entered into by, the council, and under the by-laws the council are empowered to enter into contracts for obtaining works of art in advance, and the subscriptions of future years are made subject to the fulfilment of such contracts.

Every member of the Society who subscribes one guinea receives in the year for which such subscription is paid one engraving or copy of the annual work of art for that year, or any of the annual works of art for any preceding year of which such engravings or copies may not have been exhausted, and

also one chance of obtaining one of the prizes distributed in that year as hereinafter mentioned. Any member having paid his subscription for the current year may have any number of extra chances in the allotments or distribution of prizes at half-a-guinea each, but without being entitled to a second print. A subscription for ten years in advance entitles the subscriber to a porcelain bust or other work as a bonus in addition to the usual advantages attached to the subscription. And any member who has subscribed ten guineas in successive years ending with the current year, without gaining a prize of any kind in that period, is entitled to one of the Society's porcelain busts or other work of art as a consolation prize. The prizes are awarded by lot at an annual distribution held usually in or about the month of April. The prizes consist partly of such of the annual or other works of art purchased by the Society either in the then current or any preceding year as the council may determine, and partly of works of art to be selected by the prize-holders from the Royal Academy or from the exhibition of the Society of British Artists or from the exhibitions of either of the two Societies of Painters in Water Colours, or from certain other exhibitions in the United Kingdom as may be determined by the council for the current year. The number, character and value of all prizes are determined by the council. The holder of a prize to be selected by himself may choose one work of art only. Such work of art may be of greater estimated value than the prize provided, and if so the prize-holder pays the balance, but if a work of less value than the prize is selected the surplus falls into the reserve fund of the Society. The amount of the prize or of the price of the work of art selected (whichever is the less) is paid by the council direct to the artist, and no payment is ever made to or permitted to come into the hands of the prize-holder. Every work of art so selected is delivered direct to the Society for exhibition and does not become the property of the prize-holder until after such exhibition. The selection of a work of art as mentioned in the last paragraph is required to be made within a period generally of three months after the date of the distribution of prizes for the year in which the prize is awarded, and if not so made or if

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the prize-holder makes or attempts to make any arrangement with the artist or otherwise for obtaining the return of any portion of the amount paid for the prize or other valuable consideration, or sells or attempts to sell his right of selection or in any other way attempts to evade any of the Society's laws, the amount of the prize is forfeited and merges in the reserve fund of the Society. In any of the above cases (except only the case of the selection not being made within the prescribed time) the prize-holder ceases to be a member of the Society and becomes ineligible to rejoin it. The prizes for each year (whether selected by the council or the prize-holder) and the annual work of art for such year and some of the engravings or copies thereof are exhibited in the same year (generally in the month of August) in the gallery of the Society. The exhibition includes also other works of art from time to time in the Society's possession. The exhibition remains open two or three weeks and members and their friends have free admission thereto.

Great care is exercised by the council in the selection and purchase of works of art and in the choice of artists to execute engravings and other works of art, with the view of ensuring that the same shall be of real merit, and particularly with the view of elevating art and creating an increased demand for works of art and an improved taste on the part of the public. The Society claim to have materially contributed to this object by the encouragement they have afforded to rising artists who have been by their means assisted to establish wide reputations. The council have also from time to time offered premiums for the best works executed by artists in competition in design, painting, and sculpture, the competition being conducted and adjudicated upon by the council. In this manner premiums amounting to more than 3000*l.* have been awarded to artists. The last of such premiums was awarded in the year 1875, and the Society may again (if and when the council think desirable) offer similar premiums. The Society claim (among other things) to have kept alive the arts of line engraving and of medal die engraving. The Society published in 1891 two editions of an album containing reproductions of a selection of the works of

art from time to time executed by their orders, prefaced by a short account of the Society and containing trade advertisements paid for by the respective advertisers. The album (after taking into account the money received for the advertisements) is sold at less than cost price.

The property of the Society consists of the premises No. 112 Strand and the furniture and fittings upon such premises, and of a large collection of engravings, statuettes, busts and medals together with original pictures, statuary bronzes and other works of art, and includes also a small reference library for the use of members of books connected with the fine arts. In 1891 and 1892 the Society received in addition to the subscriptions of members and the rent received in respect of an underlease the sums mentioned below, and they have also received the payments in respect of the album mentioned above. Save as aforesaid and with the exception of a few works of art which have from time to time been presented to the Society the whole of their property has been derived from the subscriptions of members, and they have no income other than their current subscriptions. In 1891 the Society let their gallery for 25*l.* for a private view of pictures, and in June and July 1892 for 50*l.* for an exhibition of equestrian pictures and sketches. It is not and has never been the practice of the Society to let any part of the premises occupied by them nor (save as hereinbefore mentioned) have they ever done so, and during the period covered by this case the Society has not in fact let any part of such premises.

The rated premises are used for the council and general meetings of the Society and include the offices in which the business of the Society is transacted. They contain also a gallery for the annual exhibition aforesaid and rooms in which are kept the Society's works of art. One caretaker sleeps on the premises rent-free.

On November 17, 1892, the barrister-at-law for the time being appointed to certify the rules of friendly societies in England certified pursuant to 6 & 7 Vict. c. 36 upon three copies of the charter and by-laws of the Society submitted to him in accordance with such statute, that the Society was

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entitled to the benefit of the Act. No alteration has been made in the Society's by-laws since the date at which such certificate was applied for as aforesaid. Notwithstanding that the Society was established in 1837 exemption from payment of rates was not claimed until 1892.

The Society submit that under the circumstances aforesaid they are a Society established exclusively for purposes of science, literature or the fine arts and should be exempt from the rates in respect of the premises occupied by them for the transaction of their business and for carrying into effect their purposes within the meaning of 6 and 7 Vict. c. 36, and that they are also within the meaning of such Act supported wholly or in part by annual voluntary contributions, and that they do not and by their laws may not make any dividend, gift, division or bonus in money unto or between any of their members, and that they have complied with the required conditions and obtained the certificate of the barrister-at-law as required by the Act, and that therefore they are entitled under the Act to exemption from liability to be assessed or rated or to pay rates in respect of the rated premises. The respondents contend from the facts stated in the case that the Society is not exempt from rates under 6 & 7 Vict. c. 36 and that the Society is not established exclusively for purposes of science, literature or the fine arts within the meaning of the Act.

The question for the Court is whether the Society is entitled under the Act 6 & 7 Vict. c. 36 to such exemption.

The Queen's Bench Division held that the Society was not exempt, and this decision was reversed by the Court of Appeal (Lord Esher M.R. and Kay L.J., A. L. Smith L.J. dissenting) who held that the Society was entitled to the exemption. (1)

The Act 6 & 7 Vict. c. 36 s. 1 exempts from rating "any land, houses or buildings or parts of houses or buildings belonging to any society instituted for purposes of science, literature or the fine arts exclusively, either as tenant or as owner and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary con-

(1) [1894] 2 Q. B. 609.

tributions, and shall not and by its laws may not make any dividend, gift, division or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law" for the time being appointed to certify the rules of friendly societies.

Feb. 18. *Sir E. Clarke Q.C.* and *Haldinstein* for the appellants. The Society is not carried on exclusively for the purposes of the fine arts. It is a trading concern engaged in buying and selling pictures. No one could say that Mudie's Library existed for the promotion of literature, and the two cases are much alike. It is, to use Talfourd J.'s language, "a joint stock society for the purchase of pictures." Secondly, it is not supported by "voluntary contributions." In this connexion "voluntary" means gratuitous—where no consideration is given; or, as A. L. Smith L.J. below, quoting from Lord Campbell C.J.'s judgment in *Russell Institution* v. *St. Giles's Vestry* (1), observed, "made for disinterested motives for the benefit of others." These contributions are not so made, for it is an inducement repeatedly put forward in many forms by the respondents that the member gets at least his money's worth in return for his subscription. They have also valuable property from which they receive rents. The authorities, which are perhaps more than usually conflicting and inconsistent with one another, with themselves and with principle, are collected in the *New University Club Case.* (2) It cannot be said that where a substantial return is made in return for annual payments—and the term "payment" is repeatedly used in the respondent's album—that the Society exists exclusively for the advancement of fine art, or that the payments are voluntary in the sense intended by the Act of Parliament. In *Commissioners of Inland Revenue* v. *Forrest* (3) Lord Macnaghten points out that the exemption conferred by this Act is much narrower than that which is given in the Customs and Inland Revenue Act 1885 s. 11 sub-s. 3. The reasoning of A. L. Smith L.J. below is conclusive.

(1) 3 E. & B. 416; 23 L. J. (M.C.) 65. (2) 18 Q. B. D. 720.
(3) 15 App. Cas. 334.

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Sir R. T. Reid Q.C. and *L. S. Bristowe* for the respondents. Both conditions for exemption are fulfilled. The Society exists exclusively for the advancement of art and is in part or wholly maintained by "voluntary contributions." The objects of the institution are one thing—the motives of its members may be another. A charity bazaar is not less charitable because things are bought and sold. The union makes no profits and distributes no bonus. There is a large accumulation of pictures over and above the prizes and engravings given to members. It is not the less exclusively dedicated to art because the subscribers get something in the nature of a quid pro quo. What is purchased is not a picture, but membership. Secondly, "voluntary" is opposed to compulsory: *Churchwardens and Overseers of Birmingham* v. *Shaw* (1); *Liverpool Library* v. *Mayor, &c., of Liverpool* (2); *Churchwardens, &c., of St. Anne, Westminster* v. *Linnæan Society* (3); *Reg.* v. *Bradford Library.* (4) *Russell Institution* v. *St. Giles's Vestry* (5) was the case practically of a club; and in *St. Marylebone* v. *Zoological Society of London* (6) the public were admitted on payment, so that the gardens were an ordinary pleasure resort. The same observation applies to *Reg.* v. *Brandt* (7) and *Reg.* v. *Gaskell.* (8) According to the authorities, "voluntary" does not mean "gratuitous," but "not compulsory"—that which cannot be enforced because it is not merely a bargain. Further, in the requirement that there shall be no "dividend, gift, division or bonus in money" the words "in money" apply to the whole clause.

Haldinstein, in reply, cited *Reg.* v. *Institution of Civil Engineers.* (9)

The House took time for consideration.

(1) 10 Q. B. 868; 18 L. J. (M.C.) 89.
(2) 5 H. & N. 526; 29 L. J. (M.C.) 221.
(3) 3 E. & B. 793; 23 L. J. (M.C.) 148.
(4) 1 E. & E. 88; 28 L. J. (M.C.) 73.
(5) 3 E. & B. 416; 23 L. J. (M.C.) 65.
(6) 3 E. & B. 807; 23 L. J. (M.C.) 139.
(7) 16 Q. B. 462; 20 L. J. (M.C.) 119.
(8) 16 Q. B. 472; 21 L. J. (M.C.) 29.
(9) 5 Q. B. D. 48.

May 5. LORD HALSBURY L.C. (after citing 6 & 7 Vict. c. 36, s. 1). My Lords, the question in this case depends upon a very simple alternative exposition of the sense in which the Legislature used the word "voluntary." The Society is partly supported by annual contributions, and the word "voluntary" must be construed in order to decide whether it is partly supported by voluntary contributions. Two conditions have been insisted on for the exemption claimed by the art union; one is, the exclusive devotion of its property to the purposes of art; upon that, as it appears to me, no question arises. But the other condition is that it must be wholly or in part supported by voluntary contributions.

My Lords, there is no doubt that the word "voluntary" is constantly used in two different senses: it is constantly used as the antithesis of something done under compulsion; but it is also used commonly among lawyers—and not uncommonly among other people—as denoting the obtaining or giving of something without anything being obtained in return. A lawyer speaks of a voluntary conveyance as opposed to one which involves valuable consideration. It is common to hear of some institution supported by voluntary contributions. There is no doubt of the frequent use of the word "voluntary" in both these senses; and the problem to be solved is in what sense, or in which of these two senses, the Legislature has used the word in the section under construction. It is manifest that if used in the former sense every purchase is voluntary, since no one can be compelled to buy; but if in the latter sense, there are a great many institutions which the Legislature may well have intended to encourage, because if people gave their money without receiving anything in return towards the encouragement of objects which the Legislature approved, there would be a reason why the Legislature should exempt such institutions from rating, since they would pro tanto relieve the national funds from burdens to which, but for such voluntary contributions, the Legislature itself might be called upon to contribute if such institutions were to exist at all. This consideration would seem to shew that it is in the latter sense that the word

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is used, and, if so, it is fatal to the claim of the art union to be relieved from the burden in question.

It hardly admits of debate that the Art Union gives to every subscriber full value for his money. The document published by the art union itself appears to establish very clearly that the subscriber obtains as an equivalent for his contribution money's worth at least equal to if not beyond the amount he has subscribed. I cannot therefore regard this as a voluntary contribution; it is a prudent and well-rewarded investment. The result is that the exemption cannot be insisted on, and I move your Lordships that the judgment of the Court of Appeal be reversed, and the appeal allowed with costs.

LORD HERSCHELL. My Lords, the question raised by this appeal is, whether the respondents are exempt from liability to be rated in respect of a building occupied by them, on the ground that it belongs to a Society instituted for purposes of the fine arts exclusively, and is occupied by it for carrying into effect its purposes, and that the Society is supported wholly or in part by annual voluntary contributions.

The Divisional Court of the Queen's Bench held that the respondents were not so exempt; but this judgment was reversed by the Court of Appeal, A. L. Smith L.J. dissenting.

It is stated by the charter that the respondent Society was formed "for the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally." Whatever view may be taken of the means employed to accomplish this end, I see no reason to doubt that the Society was instituted for the purposes of the fine arts exclusively within the meaning of the statute, and that these purposes have not been departed from. Upon this point the Court of Appeal was unanimous. The question which gave rise to a difference of opinion is one of greater difficulty. Is the Society supported wholly or in part "by annual voluntary contributions"? These words have been the subject of much discussion, and there are many judicial dicta bearing upon their meaning. I proceed at once to an

examination of the authorities, for if these had been uniform and consistent your Lordships would have been unwilling, though not bound by them, to disturb a long-settled construction of the statute. But it will be seen that this is very far from being the case.

The earliest of the authorities is the *Churchwardens of Birmingham* v. *Shaw*. (1) Lord Denman C.J., in delivering the judgment of the Court, said: "It is perhaps not easy to determine what the Legislature intended by the word 'voluntary' in this combination . . . . Upon consideration we think that annual contributions will satisfy the condition required, if they commence of the party's own choice, are so continued, and may be withdrawn at pleasure . . . . If the contributor was free to commence his contribution and incurs no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor unless we add something to the idea of voluntariness, which in ordinary language it does not import. And that is what, in fact, is done by those who contend that it must be also gratuitous and bring no return of any kind to the contributor." This judgment appears to me to lose sight of the fact that what has to be construed is the combination "voluntary contributions," and not merely the word "voluntary" alone, or in some other combination. It may be that this word is ordinarily used as the antithesis to "compulsory," though in legal parlance it is quite commonly employed to describe that which is gratuitous and without consideration. But putting aside this legal acceptation of the word, I cannot think that "voluntary contributions" in the statute means the same thing as "voluntary payments," or that an institution can properly be said to be supported by voluntary contributions where these are the price paid for a purchase, whether of goods or advantages, merely because the person making the payment was under no obligation to do so.

The *Birmingham Case* (1) was followed in *Reg.* v. *Overseers of Manchester* (2), the Royal Manchester Institution being held

(1) 10 Q. B. 868; 18 L. J. (M.C.) 89.

(2) 16 Q. B. 449.

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exempt from rating. In *Reg.* v. *Brandt* (1), however, where it was sought to extend the exemption to a concert hall, to the concerts in which subscribers and their friends alone were admitted, Lord Campbell C.J. said: "We look upon this institution as totally different from the Birmingham Library or the Manchester Institution, where the members, not with a view to their own gratification, but to the good of others by cultivating in them a taste for literature, science, and the fine arts, subscribe money and contribute their personal trouble, and may, therefore, be fairly supposed to be the objects of the special favour of the Legislature at the cost of their fellow parishioners." Again, in the case of *Reg.* v. *Gaskell* (2), a house belonging to the Portico Society, containing a library and reading-room, the use of which was confined to members of the society, was on the same grounds held not exempt.

The question next arose in the *Russell Institution Case.* (3) It was held not to be a society instituted for purposes of literature exclusively; but Lord Campbell made some observations on the part of the enactment now under consideration. "It is unnecessary," he said, "to decide whether this be a society supported in part by annual voluntary contributions within the meaning of the Act. There may be ground for contending that 'contribution' here does not mean a voluntary annual subscription or payment of money for value received or expected to be received by the party paying, but means a gift from disinterested motives for the benefit of others." In *St. Anne* v. *Linnæan Society* (4) a building belonging to that society was held to be within the exemption. Lord Campbell said: "The case in no way resembles the Russell Institution, where newspapers were supplied and accommodations given to the subscribers, preventing the payments from being mere voluntary contributions for the promotion of science." It is to be noted, too, that the mere fact that the payments of the Fellows were voluntary in the sense that they might be discontinued at any

(1) 16 Q. B. 462; 20 L. J. (M.C.) 119.

(2) 16 Q. B. 472; 21 L. J. (M.C.) 29.

(3) 3 E. & B. 416; 23 L. J. (M.C.) 65.

(4) 3 E. & B. 793; 23 L. J. (M.C.) 148.

time was apparently treated as unimportant, for the Chief Justice, after pointing out that, though the Fellows were under an obligation to pay while they continued Fellows, the payment was still voluntary, seeing that the obligation was incurred by a voluntary engagement from which the Fellows were at liberty to withdraw, added, "though I do not say that, even if they had no longer the power to withdraw, the payment would be the less voluntary."

Whilst the building belonging to the Linnæan Society obtained the benefit of the exemption, it was held inapplicable to the buildings of the Zoological Society. (1) The decision turned mainly upon the earlier provisions of the enactment; but Lord Campbell C.J. observed that if it had been necessary to decide the point, he should have said that the contributions were not voluntary contributions within the meaning of the Act, inasmuch as subscribers looked to the amusement which they and their families and friends would derive from their access to the gardens. And on the same point Erle J. said: "As to the question whether the contributions are voluntary, we have expressed an opinion that contributions are not so where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects."

In the case of the Bradford Library (2), which was open only to members, the Queen's Bench followed the *Birmingham Case*. (3) Erle J. said: "Although personal benefit is derived by each subscriber, that is not a personal benefit or convenience such as has been mentioned in some of the cases, which means something in the nature of that derived from an investment of money, though not absolutely a return of so much per cent.; if you by investment get something for which you would otherwise have to pay, for instance, the advantage of non-payment on admission to public gardens, then the subscription is not voluntary." This does not seem to me quite consistent with the dictum of the same learned judge which I have just quoted.

(1) 3 E. & B. 807; 23 L. J. (M.C.) 139.

(2) 1 E. & E. 88; 28 L. J. (M.C.) 73.

(3) 10 Q. B. 868; 18 L. J. (M.C.) 89.

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Each member of the library did purchase a private convenience. He obtained the opportunity of reading books which he must otherwise have purchased or hired. This seems to me to be a return for the investment he made in contributing to the funds of the library. I confess I am unable to appreciate the distinction which the learned judge suggests.

Somewhat similar words came before the Courts for construction in the case of the Customs and Inland Revenue Act 1885, which exempted from the taxation thereby imposed "property acquired by or with funds voluntarily contributed." The view taken of the meaning of the words "voluntarily contributed" in the *New University Club Case* (1), and by my noble and learned friends Lords Watson and Macnaghten in the case of *Commissioners of Inland Revenue* v. *Forrest* (2), was in complete accordance with that more than once expressed by Lord Campbell in discussing the meaning of the expression "voluntary contributions."

The matter now comes for the first time before your Lordships' House for decision. I do not think it was intended to exempt from rating buildings belonging to a society merely because the payments by which it was wholly or in part supported were made voluntarily and not compulsorily, when they were not made gratuitously, but were the price of advantages obtained in return for them. The expression "supported by voluntary contributions" has long been well known in connection with hospitals and other institutions; I think the essential idea conveyed by them is that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by the contributor. It was pointed out by Kay L.J. that in the case of some hospitals the contributors receive a certain number of letters of admission measured by the amount of their subscriptions. But though this may give them a voice as to the persons who are to be the objects of the charity, I think it would be unreasonable to regard the contribution as being on that account not a gratuitous charitable gift, but the purchase of a personal advantage. If, indeed, a hospital were established on co-operative principles, each con-

(1) 18 Q. B. D. 720. (2) 15 App. Cas. 334.

tributor being entitled to claim medical treatment there, and the inmates being confined to contributors, I should say that it was not supported by "voluntary contributions," even though there was nothing to compel any person to become a contributor, and he might cease to be so at any time he pleased.

Applying the construction I have put upon the statute to the facts of the present case, I have come to the conclusion that the payments made by the members of the Art Union are not "voluntary contributions." Every member receives each year, in return for his subscription of a guinea, a copy of an engraving, and, in addition, one chance in the annual distribution of prizes. He may purchase extra chances at half-a-guinea each. The council also present a consolation prize to members who have paid ten consecutive subscriptions without gaining any prize. This arrangement, they say, "has given great satisfaction and has avoided any disappointment on account of want of success in the annual distribution." And they point out that the engraving given to every one is a work of the market value at least of his subscription, and that, looking to the probable extinction of line engraving, members have the opportunity of acquiring valuable artist's proofs, the value of which in a few years must rise to many times their present cost. In addition to this, attention is called by the council to the fact that the highest prize of one year, 300*l.*, with 200*l.* added by the prizeholder, was expended on the purchase of a picture which had since been sold for upwards of 1000*l.*

When statements such as these are put forward by the council as an inducement to persons to join the society, I cannot but hold that the contributions of members are not "voluntary contributions" within the meaning of the Act.

I think, therefore, that the judgment appealed from should be reversed.

LORD MACNAGHTEN. My Lords, it cannot, I think, be denied that the Art Union of London is a society instituted for the purposes of the fine arts exclusively. That seems to me to be clear on consideration of its charter and by-laws and the provisions of the Art Unions Act 1846. But it seems to me to be equally clear that the Art Union of London cannot properly

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be described as a society "supported wholly or in part by annual voluntary contributions." This description, which is an essential condition of immunity under the Act, has given rise to a good deal of controversy and some difference of opinion. Apart from authority the meaning of the provision would seem to be tolerably obvious. The first observation that must, I think, occur to any one who may be called upon to construe it is that the phrase which the Legislature has adopted is an old and familar acquaintance. In the public streets it meets the eye not unfrequently on the walls of schools and hospitals; it is to be found in the forefront of many charitable appeals. So used, it carries with it a meaning which nobody can mistake. It means that the institution on whose behalf the statement is put forward depends for its support on freewill offerings—on the generosity of persons acting from disinterested motives, and not looking for any return in the shape of direct personal advantage. Except in the Act of 1843 the expression is not, I think, found in any other connection. Nor is it, so far as I am aware, ever used in any other sense outside the Act. It is only natural to suppose that the enactment points to contributions partaking of a similar character and made in a similar spirit. It appears to me to be almost absurd to say that a society is supported by voluntary contributions when it prides itself, as the Art Union of London openly does, on returning to every contributor the equivalent of his contributions in market value and money's worth.

Very little assistance is to be derived from the reported cases on the subject. The authorities are, I think, neither clear nor consistent. The error, if I may call it so, began with the case of the Birmingham Library, in 1849 (*Churchwardens of Birmingham* v. *Shaw*). (1) There Lord Denman C.J., who delivered the opinion of the Court of Queen's Bench, observes that "it is not, perhaps, easy to determine what the Legislature intended by the word 'voluntary' in this combination." Then his Lordship proceeds to take the word out of its setting, and to deal with it as if it stood alone. On this the difficulty vanishes, and the conclusion is that if the contributor was free to commence his contribution and incurs no legal obligation to continue

(1) 10 Q. B. 868.

it, he must be considered a voluntary contributor "unless," as his Lordship says, "we add something to the idea of voluntariness which in ordinary language it does not import." Lord Denman's view was carried still further in a later case, where it was laid down that "a contribution paid under an obligation voluntarily incurred is a voluntary contribution": *Bradford Library Society* v. *Churchwardens of Bradford* (1), per Lord Campbell citing *Churchwardens of St. Anne* v. *Linnæan Society*. (2) So that it seems it would not be inappropriate to describe a co-operative store where membership is constituted by the purchase of an annual ticket, or even the ground landlord of a fashionable quarter in London, as supported in part by annual voluntary contributions. On the other hand, in order to escape from the consequence of this view, which would render the condition under consideration almost, if not altogether, unmeaning, it has been held in several cases that where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose "exclusively." This mode of construction may be admissible when the society is not incorporated, and its purpose, consequently, is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it. In some cases it has been said that contributions which go to purchase some private benefit in the shape of amusement or convenience are not to be deemed voluntary according to the true intention of the Act. I think that is so; but then I think that this intention is only to be discovered by taking the words as they occur—in the combination in which they are placed—not by breaking up a compound expression and weighing the words separately.

I agree with the view that A. L. Smith L.J. has expressed, and I think that the appeal must be allowed.

LORD SHAND. My Lords, in the decision of this case I think a distinction must be clearly drawn between the purpose for which the Society was instituted, and the objects of those

(1) 1 E. & E. at p. 96. (2) 3 E. & B. 793.

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who join it, and who annually subscribe to its funds. The society was, I think, instituted for the promotion of the fine arts exclusively. The question whether it has been supported wholly or in part by voluntary contributions involves a consideration of the object and purpose which the persons who give the annual contributions have in view in becoming contributors.

Now, it seems to be quite clear that the inducement held out to contributors to join the society, and which, therefore, may be taken to shew the object for which the contributors become members, is that they will receive a return, not in money it is true, but in money's worth, which appears to me to be the same thing, for every contribution made. The members become in truth purchasers of personal property in the form of engravings, with the addition of the chance of prizes in the shape of paintings—advantages which form an adequate return for the money subscribed. I agree with your Lordships in thinking that money subscribed in this way cannot be properly regarded as "voluntary contributions." That term seems to me to imply not merely that the subscriber chooses of his own free will to make his contribution, but that he does so for the benefit of others—as in the support of a hospital or other charitable institution, or in the promotion of science, literature or the fine arts. It is not, I think, properly applicable to what is in substance a business transaction or investment in which the stipulation, or at least the agreement, is that a personal advantage substantially of the value of the sum subscribed is to be received in return by the contributor. I therefore concur in thinking that the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed and judgment of the Queen's Bench Division restored with costs here and below: cause remitted to the Queen's Bench Division.

Lords' Journals, May 5, 1896.

Solicitors for appellants: *B. H. & E. Van Tromp.*
Solicitors for respondents: *Hopgoods & Dowson.*

[HOUSE OF LORDS.]

THE COUNTY COUNCIL OF DERBY . APPELLANTS; AND THE URBAN DISTRICT OF MATLOCK BATH AND SCARTHIN NICK . . RESPONDENTS.

H. L. (E.) 1896 April 28.

Highway—Main Road—Footways, Repair of, in Urban Districts—Highways and Locomotives (Amendment) Act 1878 (*c.* 77) *s.* 13—*Local Government Act* 1888 (*c.* 41) *s.* 11.

A county council is liable under the Local Government Act 1888 (c. 41) s. 11 sub-s. 2 to make to the urban authority an annual payment towards the costs of the maintenance and repair in an urban district of the paved footpaths upon or at the sides of disturnpiked roads which have become main roads under the Highways and Locomotives (Amendment) Act 1878 (c. 77) s. 13.

The decisions to this effect in *In re Warminster &c.* (25 Q. B. D. 450) and *In re Burslem &c.* ([1896] 1 Q. B. 24) approved.

THE road which leads from Buxton to Derby passing through Matlock Bath was a turnpike road till 1883 when it was disturnpiked and became a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878 (c. 77) s. 13. The respondents as an urban authority, having under the Local Government Act 1888 (c. 41) s. 11 sub-s. 2 claimed to retain the powers and duties of maintaining the main road within their district, called upon the appellants as the county council for Derby to pay to them the sum of 310*l.* 6*s.* 3*d.* for the repair of the paved footpaths at the side of the main road during the two years ending March 31, 1892. The appellants denying their liability on the ground that the footpaths were not part of the main road were sued by the respondents. Wright J., who tried the action without a jury, being bound by *In re Warminster* (1) gave judgment for the plaintiffs for 264*l.* 18*s.* 8*d.* (the amount determined by the award of the Local Government Board under s. 11 sub-s. 3), and the Court of Appeal

(1) 25 Q. B. D. 450.

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(Lord Esher M.R., Kay and Rigby L.JJ.) dismissed the defendants' appeal with costs. From these decisions the defendants brought the present appeal.

April 27. *Littler Q.C.* and *Cripps Q.C.* (*Etherington Smith* with them) for the appellants. This is virtually an appeal from *In re Burslem &c.* (1) and *In re Warminster &c.* (2) where the question now at issue arose. The question is whether where a disturnpiked road becomes a main road under the Act of 1878 the county council is liable under the Local Government Act of 1888 for the repair of paved footpaths which are at the side of the main road, but which were never repairable by the turnpike trustees, and were therefore never part of the turnpike road. The sole object of s. 13 of the Act of 1878 was to transfer to the county half the burden of repairing roads which were disturnpiked and which while turnpike roads were repairable by the turnpike trustees. It was never intended to throw upon the county a burden which had never lain upon the turnpike trustees. By the General Turnpike Act (3 Geo. 4 c. 126) s. 112 turnpike trustees had no power to repair paved footpaths at the side of the turnpike road; they were repairable by the inhabitants of the town and never were part of the turnpike road. Part of the highway they are: but that is quite a different thing. This being so under the Act of 1878, the Legislature cannot have intended by the Act of 1888 to enlarge the liability, and the term "main road" in the later Act, which is not expressly defined, must mean a road which has ceased to be a turnpike road, that is the carriageway. The Act of 1888 made the county liable for the whole repair of such roads, instead of the half as provided by the Act of 1878. But there is not a word implying an intention to make the county liable for matters for which the turnpike trustees were not liable. Cases may well occur where it would be a monstrous injustice to lay the burden on the county: for instance footpaths on land which was not originally part of the highway subject to the turnpike trust, might afterwards become dedicated to the public and be paved and flagged by

(1) [1896] 1 Q. B. 24. (2) 25 Q. B. D. 450.

the inhabitants of a town. In *Justices of West Riding* v. *Reg.* (1) Lord Blackburn distinguishes between a turnpike road and a parish highway, and throughout the Turnpike Acts a distinction is drawn between a road and a footpath. Many through roads have for long distances no footpaths, and the strips along the side though they might be parts of the highway were never considered part of the turnpike road. Sect. 15 of the Act of 1878 gives power in certain cases to declare an ordinary highway to be a "main road"; therefore in the absence of an order to that effect disturnpiked roads alone are main roads, and the county council can be under no greater obligation than were the turnpike trustees. This view is supported by *Justices of Lancashire* v. *Mayor, &c., of Rochdale* (2) and *Justices of Lancashire* v. *Improvement Commissioners of Newton in Makerfield.* (3) Before the Local Government Act 1888 no attempt had ever been made to make a footpath repairable by the county authority. Sect. 11 of that Act is virtually a penal section casting an additional burden on the county council, and it must be shewn affirmatively that a greater liability attaches to the county council than rested on the turnpike trustees.

Lawson Walton Q.C. and *Macmorran Q.C.* for the respondents were not heard.

April 28. LORD HERSCHELL. My Lords, the question in the present case is whether the appellants, the county council of Derby, are liable to bear the expense of repairing footways which are on either side of a carriage-way which passes through Matlock Bath and which was formerly a turnpike road. The question arises substantially upon the construction of the Highways and Locomotives (Amendment) Act 1878, because, although the Local Government Act 1888 casts upon the county the entire maintenance and repair of main roads, in order to see what are main roads it is necessary to look at the Act of 1878. The 13th section provides that "For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st of December, 1870, and the date of the

(1) 8 App. Cas. 781, 790. (2) 8 App. Cas. 494.
(3) 11 App. Cas. 416.

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passing of this Act, ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road," and then it casts one-half of the expenses incurred in the maintenance of such road on the county. The only change made by the later Act is to turn that burden of one-half into the entire burden of repair.

The sole question, I think, to be determined is, What is the meaning of "a road which has ceased to be a turnpike road" in the 13th section which I have read? I should state that the footways in question passing through Matlock Bath have been paved and kept in repair by the urban district authority. It is contended on behalf of the appellants that the object of the 13th section of the Act of 1878, and its only object, was to transfer to the county one-half of the burden of repair, which whilst the road was a turnpike road was borne by the turnpike trustees, and that it was not intended to cast upon the county the burden of repair in respect of anything which was not repaired by the turnpike trustees.

My Lords, the section is not so framed: it does not in terms indicate any such intention. If that had been the intention it might have been expressed in language very simple and unambiguous. The Legislature has in terms cast upon the county by that section one-half of the repair of the roads when they "cease to be turnpike roads," whatever the meaning of those words may be. It seems to me impossible for your Lordships to speculate as to what were the intentions of the Legislature in making this change. It is very possible that in this case (it would not be without precedent) certain results may arise incidental to the legislation, which were not foreseen at the time when the Act was passed, which may produce some inequality, perhaps even an unfair inequality of burden; but if your Lordships, instead of interpreting the language used according to its plain meaning, were upon any such speculation to endeavour to do what is called justice, you would be just as likely, whilst doing perhaps justice in a particular direction, to create as great or even a greater injustice in another direction. Any appeal of that sort with reference to the unfair incidence

of this burden of repair must be made to the Legislature and not to the Courts.

Now, the question is, What is meant by a road "which has ceased to be a turnpike road"? My Lords, it is said that under the General Turnpike Act of Geo. 4 the turnpike trustees had no power to pave or keep in repair these footways, and that, therefore, they cannot be regarded as any part of the turnpike road. If the matter now arose for the first time I think it would be open to substantial argument—such as was urged in the cases to which I will call attention in a moment—that where any part of that which would otherwise be a turnpike road was repaired by an authority other than the turnpike trustees, where the turnpike trustees on that part of the road could have set up no turnpike, and where the expense was borne entirely by some other authority—that could not be regarded as a part of the turnpike road—that it ceased to be part of the turnpike road so soon as the authority to repair it and deal with it as with other parts of the turnpike road ceased. My Lords, that was the argument which was urged in this House in the case of *Justices of the West Riding* v. *Reg.* (1), and afterwards in the case of *Justices of the Peace of the County of Lancaster* v. *Improvement Commissioners of Newton in Makerfield.* (2) But that argument was urged in vain, and it was held in both those cases that even though a portion of a turnpike road had during the currency of the term for which the trust was created become part of a street within a borough and no longer repairable by the turnpike trustees, it nevertheless remained so far a part of the turnpike road as to become part of the main road when the trust expired within the time specified in s. 13. My Lords, therefore it seems to me that the argument to which I have alluded, that this cannot be regarded as part of the turnpike road which became a main road on the ceasing of the turnpike trust, because the footways were maintained and repaired by the urban district authority, cannot be maintained. That being so, it seems to me that if on that ground, namely, the fact that the expense of repair is borne by the urban district authority, the footways cannot be declared

(1) 8 App. Cas. 781, 790. (2) 11 App. Cas. 416.

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no part of the turnpike road, it is impossible to distinguish these parts of the footways from the other parts which are outside the district of the urban district authority, and which can be and have been maintained and repaired by the turnpike trustees. Unless it can be shewn that these footways are equally outside the definition of a turnpike road, and, therefore, a main road, the case must fail as to the portions which are within the province of the urban district authority and have been repaired by them.

It has been argued on behalf of the appellants that all these footways are outside the definition of a main road, because they are outside the definition of a turnpike road, and that they form, in fact, no part of that road at all. The case has been put in different ways. It has been suggested that all that is turnpike road is that part of any highway which is metalled and adapted for use by vehicles or horses, and that any part of the highway which has not been so adapted, although a portion of the highway, is no portion of the turnpike road. My Lords, it seems to me that contention is wholly untenable. That it is so, I think, is capable of demonstration. Take the case of a portion of the highway which is in grass outside the footpath, perhaps on one side, perhaps on both sides of the road—a very common case. It cannot be doubted that no person riding a horse could ride along that green part of the highway without paying toll; it is equally free from doubt that, having paid toll, he would have a right to ride along it because it was part of the highway. But does not that of itself suffice to shew that it must be a part of the turnpike road? It is a part of the highway accessible for use only by payment of the toll. Then can it be contended that the pathways which run along or upon a turnpike road are not part of that turnpike road? I see no ground for saying that they can be excluded from the definition of a turnpike road. It is quite true the words "turnpike road" are used in various senses, and not always consistently, in the Turnpike Act. The language is somewhat loose, and the expression is, obviously, according to the context, used in a different sense in different places. But I am satisfied that there are provisions of the Turnpike Act in which the words "turnpike road" are used as including footway as well as carriage-way; and, of

course, unless the appellants could go this length, that in no part of the Act does turnpike road include footway, they would not have advanced a step towards establishing the proposition which they seek to establish.

Therefore, my Lords, I have come to the conclusion, agreeing with the Court below in this case, and with the Queen's Bench Division in the *Warminster Case* (1), that the footways which run along the sides of the turnpike road cannot be said to be no part of the turnpike road. If they are part of the road, then they are part of a road to which the turnpike trust applied, and on the ceasing of that turnpike trust the road became a main road.

It was suggested by Mr. Cripps on behalf of the appellants that there may be roads which are on land which was not part of the highway to which the turnpike trust applied, but which became dedicated to the public use, subsequent to the creation of the turnpike trust, and which were paved and flagged for use by the inhabitants of a town. My Lords, such a case is conceivable; it is not the ordinary case, and no question with regard to such a footway arises in the present case. It is quite clear that the contention in the present case was that, as soon as it was shewn that no part of this money was expended on the carriage-way, but that it was exclusively expended upon the footways, the case of the appellants was made out, and there could be no liability. I have already given my reason for thinking that they have wholly failed to establish that proposition. When, if ever, a case such as I have alluded to comes for decision, no doubt various considerations will have to be taken into account, and the matter will then have to be determined with regard to the particular facts of the particular case. Upon such a question as that I express no opinion at the present time; but I think, for the reasons which I have given, this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. It seems to me that a footpath by the side of a road for the use

(1) 25 Q. B. D. 450.

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of foot-passengers is part of the road, and not the less so when the road is a turnpike road—that is a road with turnpikes on it. There is nothing, I think, in the General Turnpike Act on the fair construction of the whole Act inconsistent with this view, although the turnpike trustees were not concerned with the making and repairing of certain footpaths or certain portions of the footpath by the side of the road. Indeed, it may be observed that in *Loveridge* v. *Hodsoll* (1) some of the members of the Court thought the 111th section of the General Turnpike Act shewed that of necessity the footpath must form part of a turnpike road.

I do not think it would be possible to construe the Local Government Act, 1888, in the manner proposed by the learned counsel for the appellants without introducing some words which are not to be found there, and which I can see no reason for introducing.

LORD MORRIS. My Lords, I also concur. The question in this case is shortly, Are the paved footways of disestablished turnpike roads in an urban district part of the main road within the meaning of the Highways Act of 1878? That is, were the paved footways part of a turnpike road? Now, what is a turnpike road? Just a road with a turnpike upon it. A footpath is on an ordinary road part of the road; why is it not so because in this case it is a turnpike road? It is said, because s. 112 of the General Turnpike Act does not permit or empower the trustees to lay down and repair any paved footways in or upon or at the side of a turnpike road in any village or town, that is to be done at the expense of the inhabitants. Very well, that affects the incidence of taxation. It is true the trustees only maintain the carriage-way of the road; but does that alter the physical construction of the turnpike road? It does not, in my opinion. The road remains the same, carriage-way and footway.

LORD DAVEY. My Lords, the question in this case seems to me to turn really upon the construction of the 13th section of

(1) 2 B. & Ad. 602.

the Highways and Locomotives Amendment Act, 1878. The contention on behalf of the appellants is that a road which was formerly, but has ceased to be, a turnpike road is alone made a main road by that section, and that the expression "turnpike road" includes only so much of the highway as was maintainable by the Turnpike Commissioners; and that inasmuch as by s. 112 of the General Turnpike Act of 1822, the turnpike trustees were not authorized or empowered to maintain these paved footpaths in towns and villages, footpaths were not part of a "turnpike road," as that expression is used in s. 13.

My Lords, this contention was supported by frequent reference to what we were told must be the presumed intention of Parliament, and by the argument that Parliament could never have intended to relieve the urban authority of the burden of repairing the footpaths. My Lords, arguments of that description, I confess, make but little impression upon my mind. I have no knowledge of the intention of Parliament, except so far forth as that intention may be gathered from the language used by Parliament in the Act itself. We were not referred to any preamble or context in the Act which shewed any intention on the part of Parliament to the effect contended by Mr. Littler; and all one can do is to decide the question before us according to what one conceives to be the plain language of the legislation, and not to speculate upon what may, or may not, have been the intention of Parliament in passing that legislation.

Now, my Lords, the words in s. 13 are, "Any road which has within the period" mentioned "ceased to be a turnpike road" and become a main road—"*any road.*" What is a "road"? A road primâ facie includes the footpaths as well as the carriage-way. And a turnpike road, in my opinion, means a road on which there is a turnpike lawfully erected; but the fact of there being a turnpike on a road does not affect the meaning or extent of the word "road," which, as I have already said, in my opinion comprises the spaces reserved to foot-passengers as well as the carriage-way; and the mere fact that the trustees of the turnpike road were exempted from the maintenance of a portion of that road does not make the

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exempted portion any the less a part of the road which was, but has ceased to be, a turnpike road.

My Lords, this appears to me to be in accordance with the previous authorities in this House which have been referred to by my noble and learned friend on the Woolsack. As Mr. Cripps very ingeniously argued, there may be cases in which footpaths have been constructed which are really new roads running side by side with the old road on which the turnpike was. All I can say is, that to my mind it is scarcely conceivable that such a case could be made out, because I should think the presumption would be that the new piece, dedicated to the public, was intended as an addition to the already existing road. But I express no opinion upon such a case. Whenever it arises it will have to be dealt with upon its merits. No such circumstances are brought forward in the present case.

My Lords, I entirely concur with the decision in the *Warminster Case* (1), and with the reasons which were given for it; and I concur in the judgment proposed to be pronounced by this House in the present case.

Judgment appealed from affirmed and appeal dismissed with costs.

Lords' Journals April 28, 1896.

Solicitors for appellants: *Wynne, Holme & Wynne.*

Solicitors for respondents: *Baker, Lees & Postlethwaite, for F. C. Lymn, Matlock Bath.*

(1) 25 Q. B. D. 450.

[HOUSE OF LORDS.]

GRAINGER & SON . . . . . APPELLANTS; H. L. (E.)
1896
AND
May 1.
WILLIAM LANE GOUGH (SURVEYOR OF TAXES) . . . . . RESPONDENT.

Revenue—Income Tax—Trade exercised within United Kingdom—Assessment in Name of Agent—"Factor, Agent, or Receiver having the Receipt of Profits or Gains"—Income Tax Act 1853 (16 & 17 *Vict. c.* 34) *Sched. D—Income Tax Act* 1842 (5 & 6 *Vict. c.* 35) *ss.* 41–44.

A foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country.

This principle applied to the business of Roederer of Reims, wine merchant, and the decisions of the Queen's Bench Division and Court of Appeal ([1895] 1 Q. B. 71) reversed (Lord Morris dissenting).

Semble: the words in the Income Tax Act 1842 s. 41 "having the receipt of any profits or gains" apply to "factor" and "agent" as well as to "receiver."

THE following were the material facts appearing in a case stated under 43 & 44 Vict. c. 19 s. 59 by the Income Tax Commissioners for the City of London.

At a meeting of the commissioners, Grainger & Son appealed on their own behalf against assessments for each of the years 1884, 1885, and 1886 of 3000*l.* made as follows: "Louis Roederer of Reims, champagne shipper in the name of Grainger & Son, agents, 108, Fenchurch Street," under the following circumstances:—

Louis Roederer is a wine merchant and champagne shipper, whose chief place of business is at Reims, in France, and has for many years shipped large quantities of champagne to England in the course of his business. The appellants, Grainger & Son, carry on, at 108, Fenchurch Street, London, an extensive business of their own as wine merchants. They are also agents

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in Great Britain for the sale of Roederer's wine, and they appoint other persons in towns other than London as sub-agents. The business transacted by the appellants on behalf of Roederer has been carried on in England for many years, and is very extensive. The orders are sought in the name of Louis Roederer, and when received are transmitted by the appellants to Roederer at Reims, and he exercises his discretion as to executing these orders. In every instance he forwards the wine direct to the customer in England free on board at Reims, and at the latter's risk and expense. The wine is invoiced by Roederer to the customer in Roederer's name as vendor. No other wines are sent to this country except those ordered through the appellants as aforesaid. The amounts due in respect of the wine so sold are collected by Grainger & Son at 108, Fenchurch Street on behalf of Roederer, and receipts are given for and on his behalf; but the customers frequently remit the amount of their invoices direct to Roederer, as hereinafter mentioned. The appellants are entitled to a commission upon all orders received from Great Britain, if executed, and have no other interest in the sale. Roederer has registered a series of trade-marks in Great Britain, as appears by a print of the *Trade Marks Journal* annexed, and forming part of this case. He keeps a large stock of wine at Reims especially for sale in Great Britain, and known as "reserve for Great Britain"; but neither he nor the appellants for his account keep any of this stock in England. In case of default in payment by any customer, proceedings are taken in the English Courts in the name of Roederer, and proof in bankruptcy is made in Roederer's name against any bankrupt debtor. The appellants receive money, that is to say cash, from the purchasers of wine here on account of Roederer; but the money so received sometimes but rarely exceeds the commission due to the appellants, and then only to a comparatively small amount. They, on his behalf, occasionally incur and pay for him other charges which absorb such excess. Roederer usually draws on his customers in England direct. In addition to this cash, the appellants receive English and foreign drafts and cheques on English banks and on French houses payable to

Roederer in respect of orders fulfilled by him, and forward them to their principals, who send receipts to their customers therefor. It appeared from the course of business that the appellants are paid their commission by a per contra account in their ledger, in which the amounts received by them on account of Roederer are set off against the amount due to them for commission. The appellants had paid the income tax on the commission.

The appellants on their own behalf, and not on behalf of Roederer, contended upon the above-mentioned facts—1. That Roederer was not a person exercising a trade within the United Kingdom either in the terms of Sched. D of 16 & 17 Vict. c. 34 alone or read with s. 41 of 5 & 6 Vict. c. 35. 2. That the appellants were not agents within the terms of s. 41 of 5 & 6 Vict. c. 35, and they claimed that the assessment should be discharged, or that their names should be erased therefrom.

The Commissioners of Taxes were of opinion that the assessment was rightly made, and confirmed it accordingly, but at the appellants' request stated the above case for the opinion of the High Court.

The case having been remitted by the Queen's Bench Division to the Crown for amendment by finding further facts, the commissioners found as follows:—

2. That Roederer exercises and carries on the trade or business of a wine merchant in Great Britain except so far as the facts stated in the case and in this amendment prove a different conclusion in point of law.

3. That offers and proposals for the purchase of wine are not only received by Grainger & Son in England, but orders are sought by them as agents on behalf of Roederer as their principal.

4. That such orders are given by customers to Grainger & Son and received by them; but the appellants allege that Roederer in his arrangements with them as his agents has reserved a right to reject any particular order. In the opinion of the commissioners, this right is in fact intended to protect Roederer in cases where there is doubt as to the pecuniary

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position of the customer giving the order. No special notice is given to the customers of the above-mentioned right reserved.

5. In the Post Office London Directory, under the head "Trades—Wine Merchants," is inserted the following: "Roederer, Louis, Reims, champagne merchant (Grainger & Son, agents), 21, Mincing Lane, E.C.," which had been inserted by the authority and with the knowledge of the appellants. The appellants admitted that it was well known that Roederer's English agents were the appellants, at whose office orders would always be received, and that Roederer's do an extensive trade in the United Kingdom, and have done so for many years, and have habitually made contracts in the manner described in the original case.

6. The commissioners find that the wine is sold to the customers as it lies "In Reims Cellar" or "Pris en Cave." Where wine is so sold the customer pays the cost of packing, carriage from the cellars, and takes all risk. The packing and arranging for transit is, however, actually performed by persons employed by Roederer, and the customer is charged by Roederer with a sum in respect of such work under the designation, "Pour emballage, &c."

7. The invoices of the wine are made out and sent by Roederer to the appellants, who in their turn forward them to the customer. A form of the invoice is hereto annexed.

8. The commissioners find that the direct payments to Roederer by cheques or drafts to his order are more frequent than payments made through Grainger & Son, and that in addition to cash some cheques on behalf of Roederer are paid to and cashed by Grainger & Son. The receipts for all money paid either to Roederer or through Grainger & Son are sent by Roederer to the customers direct, and a form of receipt is hereto annexed and forms part of this case.

9. The appellants produced the circulars and documents hereto annexed as specimens indicative of the manner and style of business transacted by them on behalf of their principal, Roederer.

These documents are sufficiently referred to in the judgments.

The Queen's Bench Division (Mathew and Cave JJ.) were of

opinion that the appellants were liable to assessments to income tax for each of the years 1884, 1885, and 1886, and affirmed the determination of the commissioners.

This decision was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and A. L. Smith L.JJ). (1) Against these decisions the present appeal was brought.

The Income Tax Act 1853 c. 34 s. 2 Sched. D imposes a duty "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . . any trade . . . . exercised within the United Kindom."

By the Income Tax Act 1842 c. 35 s. 41 "any person not resident in" the United Kingdom, "whether a subject of Her Majesty or not, shall be chargeable in the name of . . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned. . . ."

March 12, 13, 16. *Asquith, Q.C.*, and *Pyke, Q.C.* (*R. M. Bray* with them), for the appellants. Roederer is not a person, within the language of Sched. D, exercising a trade "within the United Kingdom." In the Court of Appeal there is a confusion between trading with and trading in a country. Roederer trades with this country, but not within it. He accepts or rejects orders at Reims, and the wine becomes the customers' property there at their own risk. Delivery is in France: payment is in France: cheques are usually made payable to Roederer, and when transmitted by the appellants it is only as forwarding agents. The contract is not made or performed here, and is only completed when Roederer accepts. It is exactly *Sulley* v. *Attorney-General*. (2) In *Colquhoun* v. *Brooks* (3) Lord Herschell says: "The Income Tax Acts themselves impose a territorial limit: either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there." Neither of these conditions exists.

(1) [1895] 1 Q. B. 71. (2) 5 H. & N. 711; 29 L. J. (Ex.) 464.
(3) 14 App. Cas. 493, 504.

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The appellants are not agents within the meaning of the Act of 1842, ss. 41, 44. They have no "receipt of profits or gains." The profits must be received within the jurisdiction by a taxable person. They are not so received. The appellants have no dominion over the wine or any document of title. Such money as comes to their hands, if in excess of their commission, which is not usually the case, is transmitted. They have no means of making a return of moneys which have never passed through their hands. "Profits and gains" are the balance of receipts over expenses, and they neither have such balance nor the means of knowing the amount. The term "receiver" is used for the first time in s. 40. But the appellants are not receivers or factors or agents within the meaning of the Act of 1842 ss. 40, 41, 42, 43 or 44, or the earlier Acts, 39 Geo. 3 c. 13; 43 Geo. 3 c. 122; or 46 Geo. 3 c. 65. In all the Acts the receiver or the agent is the person through whose hands the money passes and who is in a position to make a return. The remedy by distress shews that the Legislature contemplated an agent who had the money in his hands to pay the tax.

Sir R. B. Finlay, *S.-G.*, and *Danckwerts*, for the respondent. Roederer does carry on business here within the meaning of the Acts. If one of the firm came over to England, solicited orders, and sent them for approval to Reims, there can be no doubt that a business was carried on in this country. It can make no difference that this is done by an agent and not a partner. Sect. 53 of the Act of 1842 provides that where there are several agents only one shall be charged on behalf of himself and the others. It is clear that it was intended to embrace all agents who solicit and obtain orders for their principals. If the appellants' contention was to prevail, foreigners would never allow their agents to have control of profits. The British merchant would be taxed and the foreigner would escape. To obtain orders through an agent is to trade, and it does not matter where the contract is actually concluded. As to what constitutes carrying on a business, see *Turner* v. *Evans*. (1) Erle J. says: "A wine merchant . . . . without the appurtenances of a shop, or counting-house, &c., and without clerks,

(1) 2 E. & B. 512; 22 L. J. (Q.B.) 412; and in Chancery, 2 D. M. & G. 740.

may carry on a very extensive business"; and Knight Bruce L.J. uses language to the same effect. So *Brampton* v. *Beddoes* (1); *Tischler* v. *Apthorpe* (2); *Pommery* v. *Apthorpe*. (3) It is no test or a bad test where the contract was completed: *Werle* v. *Colquhoun*. (4)

[LORD HERSCHELL. In *Erichsen* v. *Last* (5) Lord Esher said the place of the contract was the essence.]

Cave J. is right in saying that it does not matter whether the contract is made in the United Kingdom; the business is exercised here, and the whole of the expenses are incurred and discharged here. Therefore Grainger & Son are agents, and the reasoning of Cave J. below is conclusive. But in truth contracts were made in England by the appellants, for orders were given to them by persons to whom they sent price-lists.

The right to assess, as Lord Esher M.R. observes in *Werle* v. *Colquhoun* (6), is not limited by s. 41 of the Act of 1842, which only provides machinery. The appellants are agents and also receivers, having at least the receipt of some "profits or gains," which is enough to bring them within the section on "profits or gains": see Sched. D, First Case, r. 3 (Dowell's Income Tax Acts, p. 129), and *Gresham Life Assurance Society* v. *Styles* (7), per Lord Herschell L.C.

Asquith, Q.C., in reply. The judgments below lay down propositions which would apply to every case of goods exported or imported: they contend or imply that wherever the goods are consumed there is the business. It is not every agent who is within the statutes. It must be a representative plenipotentiary, and the section contemplates both earning and receiving profits in the United Kingdom.

[LORD HERSCHELL referred to *Coltness Iron Co.* v. *Black*. (8)]

"Any profits" in the section do not mean any part of the profits. The agent to be liable must have profits and gains in a taxable form and effective control of the business.

The House took time for consideration.

(1) 13 C. B. (N.S.) 538.
(2) 52 L. T. (N.S.) 814.
(3) 56 L. J. (Q.B.) 155.
(4) 20 Q. B. D. 753, 759.
(5) 8 Q. B. D. 414.
(6) 20 Q. B. D. 753, 760.
(7) [1892] A. C. 309, 323.
(8) 6 App. Cas. 315.

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May 1. LORD HERSCHELL. My Lords, the appellants are wine merchants carrying on business in the City of London. They act as agents in this country for certain purposes, which will require careful consideration, for M. Louis Roederer, a wine merchant, whose chief place of business is at Reims, in the Republic of France. Two questions arise for determination: first, whether M. Roederer exercises any trade, employment, or vocation within the United Kingdom; and next, whether, if so, he is liable to be assessed to the income tax in the name of the appellants as being his agents within the meaning of s. 41 of 5 & 6 Vict. c. 35.

The first step to be taken is to ascertain with accuracy what are the facts in the present case. I say this because one of the learned judges in the Court of Appeal expressly relied on the fact that contracts were habitually made in this country by M. Roederer, and another member of the Court seems to have regarded the finding in the case that "the appellants are agents in Great Britain for the sale of Roederer's wine" as involving a finding that sales by Roederer took place in this country. Standing by itself, the finding would probably have this meaning. But it does not stand alone. The whole of the facts found must be considered in conjunction with one another, as well those in the amended as in the original case. The nature of the appellants' agency is plain enough. They canvass for orders for Roederer's wine, and receive a commission on all orders from Great Britain, if executed. The functions of the sub-agents whom they appoint are the same. When orders are received they "are transmitted by the appellants to Louis Roederer at Reims, and he exercises his discretion as to executing the said orders." This is the statement in the original case. In the amendment it is stated that "orders are sought by them as agents on behalf of Louis Roederer as their principal, that such orders are given by customers to Messrs. Grainger & Son, and received by them; but the appellants allege that the said Louis Roederer in his arrangements with them as his agents has reserved a right to reject any particular order." The commissioners add that, in their opinion, this right is, in fact, intended to protect Roederer in cases where there is doubt

as to the pecuniary position of the customer giving the order, and that no special notice is given to the customer of the right so reserved.

The commissioners appended to the amended case certain documents produced by the appellants as specimens indicative of the manner and style of business transacted by them on behalf of M. Louis Roederer. One of them is an order addressed to the appellants. It commences—"Please ship per G. & J. Porter," and then specifies certain quantities and descriptions of Roederer's wine. The appellants in reply to this write:—"In compliance with your obliging order of yesterday we shall have much pleasure in requesting M. L. Roederer to ship for your account, through Messrs. G. & J. Porter of Calais," the wine specified.

Taking the findings together, I think it clear that no contracts to sell wine were ever made by the appellants on behalf of Roederer. All that they did was to transmit to him the orders received, and until he had agreed to comply or complied with them there was no contract. He was under no obligation to the persons giving the orders to the appellants to execute any one of them. I think the statement in the original case was, having regard to the documents, a perfectly correct one, and that it is not accurate to speak of Roederer's having reserved to himself a right to reject any particular order. An order given to a merchant for the supply of goods does not of itself create any obligation. Until something is done by the person receiving the order which amounts to an acceptance there is no contract. It is clear that the appellants in receiving an order did not accept or purport to accept it on Roederer's behalf so as to constitute a contract, and that they had no authority so to do.

The learned Solicitor-General, in his argument for the Crown, did not contend that any contracts were made in this country by M. Roederer either personally or through his agents; indeed, he admitted the contrary. Mr. Danckwerts did argue that there were such contracts. His argument was an ingenious one. He called attention to certain price-lists which were distributed by the appellants amongst persons

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likely to give orders, and contended that as soon as an order was given to them by a person receiving one of those lists a contract to supply the specified quantity at the price named in the list was complete, subject only to a right on the part of Roederer to disavow it. I think it impossible to accede to this contention. In my opinion, this would not be understood by any one in the trade to be the effect of giving an order for goods specified in such a price-list. The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited. I entertain, I confess, a very clear opinion that the Solicitor-General was quite right in arguing the case on the assumption that no sales were made in this country.

Taken in connection with the facts stated, I think the finding that the appellants "are agents in Great Britain for the sale" of Roederer's wine means no more than this, that they are engaged by him to canvass for custom, to seek to obtain from persons in this country orders for his wine. The wine is sold to the customers as it lies in Reims cellar or "Pris en Cave." The customer pays the cost of packing and carriage from the cellars and takes all risk. The delivery to the purchaser, therefore, takes place in France. The wine is invoiced to the purchaser in Roederer's name as vendor, the invoice being sent to the appellants, and by them transmitted to the purchaser. The amounts due in respect of the wines sold are sometimes collected by the appellants on behalf of Roederer, and sometimes remitted direct to him. When the payments are made to the appellants in cash or in cheques on London banks, cashed by them, the moneys so received are credited to Roederer against the amount of the commission due to them and charges incurred by them on his behalf.

Taking it to be the fact, as in my opinion it undoubtedly is,

that contracts for the sale of wine are not made by Roederer in this country, and that the delivery by him to purchasers always takes place in France, it appears to me that the case differs widely from any that have hitherto been decided. In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country. Thus, in *Erichsen* v. *Last* (1), the present Master of the Rolls said: "The only thing which we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England, by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad."

All that the appellants have done in this country on behalf of M. Roederer has been to canvass for orders, to transmit to him those orders, when obtained, and in some cases to receive payment on his behalf. Beyond this he has done nothing in this country, either personally or by agents. Does he, then, exercise his trade within the United Kingdom? It has been sometimes said that it is a question of fact whether a person so exercises his trade. In a sense this is true; but, in order to determine the question in any particular case, it is essential to form an idea of the elements which constitute the exercise of a trade within the meaning of the Act of Parliament. In the first place, I think there is a broad distinction between trading *with* a country and carrying on a trade *within* a country. Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose any one would dream of saying that they exercise or carry on their trade in every country in which their goods find customers. When it is said, then, that in the present case England is the basis of the business, that the wine was to be consumed here, and that the business done would remain undone but for the existence of

(1) 8 Q. B. D. 414.

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the customers in England, I cannot accept this as proof that M. Roederer carries on his trade in this country. It would equally prove that every merchant carries on business in every country to which his goods are exported. Moreover, the proposition would be just as true if English customers gave their orders personally at Reims. Something more must be necessary in order to constitute the exercise of a trade *within* this country. How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again, with a view to profit. If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods. Indeed, I do not think it was contended that the solicitation of custom in this country by a foreign merchant would in all cases amount to an exercise by him of his trade "within" this country. The learned counsel shrank from maintaining that if, for example, he sought custom only by sending circulars to persons residing here, or advertised in British newspapers, he could on that account be said within the meaning of the statute to be exercising his trade in this country. They relied on the circumstance that he had appointed agents in this country who regularly solicited and received orders and transmitted them to M. Roederer. If in each case the other circumstances are the same, the contract of sale being made abroad, and the delivery taking place there, I find myself quite unable to see how the mode in which orders are solicited and obtained, whether by an agent or by circulars or advertisements, can make the difference, and cause the trade in the one case to be exercised, and in the other not to be exercised within this country. If the mere employment by a foreign merchant of an agent to solicit and to transmit orders does not amount to an exercise of his trade in this country, I do not think that it becomes an exercise of his trade here if, in addition, the agent in some cases receives the price of the goods sold for transmission to his principal. Still less does it appear to me material that in the London Post Office Directory

there was inserted by the authority and with the knowledge of Grainger & Son (but not, I may observe, so far as is stated, by the authority or with the knowledge of Roederer) : "Roederer, Louis, Reims, champagne merchant (Grainger & Son, agents), 21, Mincing Lane."

For these reasons I have come to the conclusion that the taxing section does not apply in the present case. This view renders it unnecessary to decide the question whether the appellants are agents within the meaning of s. 41 of 5 & 6 Vict. But I must say that, as at present advised, I cannot adopt the view that the words "having the receipt of any profits or gains" control the word "receiver" only, and not the words "factor" and "agent." The word "agent" obviously cannot extend to every agent for whatever purpose he may be employed, as, for example, to an advertising agent. This was felt by Cave J., who said that it meant an agent "for the purpose of exercising the trade in question if it was a trade." But if the word "agent" must be in some way controlled, why introduce words for the purpose instead of treating it as controlled by the words which follow, and which may not only be made to control it without doing any violence to the language used, but seem to me to be naturally applicable to it, especially on a consideration of all the terms of the section? At the same time, I am not disposed to put so narrow a construction on the section as was contended for by the appellants. In the case of a trade exercised in this country, I think any agent who received, for the foreigner exercising such trade, moneys which included trade profit would be within the provisions of s. 41.

It was said that if M. Roederer was not liable to income tax in this case it would give foreigners an unfair advantage over British traders. This does not appear to me to be the case. I do not think such considerations can legitimately influence our decision; but if they are to be introduced, I think it would be much more prejudicial to British traders if we were to lay down that, though the sale and delivery of their goods take place in this country only, they carry on business in every other country from which they obtain orders for their goods through solicitation by an agent, or, indeed, in any other way; for I do not

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think it can logically or reasonably make any difference in principle what the method of soliciting custom may be.

I think the appeal should be allowed with costs both here and in the Courts below.

LORD WATSON. My Lords, this appeal raises two questions upon the construction of the Income Tax Acts. Did Louis Roederer, who is a champagne merchant residing and carrying on business in France, during the years 1884, 1885, and 1886 exercise his trade in this country, within the meaning of Sched. D of the Act of 1853? If so, did the appellants, Grainger & Son, act during that period as his agents in such sense as to make them answerable under s. 41 of the Act of 1842 for doing everything necessary in order to the assessment and payment of duty upon the profits or gains arising from the exercise of his trade within the United Kingdom? The facts upon which the answers to be given to these questions depend have been stated by the Commissioners of Taxes for the City of London, in a special case which was amended by them upon a remit from the Queen's Bench Division.

Louis Roederer supplies large quantities of champagne from his cellars at Reims to consumers in the United Kingdom. He has no place of business in this country, and keeps no stock of wine here, either by himself or by an agent. During the three years for which income tax is claimed his name was inserted in the London Post Office Directory under the head "Trades" in these terms: "Roederer, Louis, Reims, champagne merchant (Grainger and Son, agents), 21, Mincing Lane, E.C.," that being the address of the appellants, who carried on business as wine merchants upon their own account, and also acted, during the period in question, as his agents. Beyond receiving payments in cash or bills on his account, as will be presently noticed, the appellants' agency was limited to soliciting orders for champagne, either by themselves or through sub-agents who were appointed by them. These orders, when received, were not accepted by the appellants, who had no authority to that effect, but were transmitted by them to Louis Roederer at Reims, who invariably reserved the right to reject any order

forwarded to him. The necessary result of that course of dealing was, that until Roederer had accepted the order there was no contract which could bind him, or afford a right of action against him to the person who gave it.

When an order was accepted, the wines were packed in Reims at the expense of the customer, to whom they were then forwarded direct at his cost and risk. An invoice was made out at Reims charging the price of the wine, according to current lists furnished to the customer by the appellants, together with expenses of packing, &c., which was sent to the appellants for transmission to the customer. Each invoice contained a slip, requesting those customers who preferred paying by bill or cheque on Paris to have these drafts made out to their own order, and then to indorse them to Louis Roederer, so as to enable him to identify each remittance with the customer who sent it.

The appellants were remunerated for these services by a commission upon the orders which they procured. In some cases customers of Louis Roederer made payment to them in cash; but the money thus received by them rarely exceeded the sum due to them as commission, and then only to a small amount. The appellants also received English and foreign drafts and cheques in favour of Louis Roederer, for which they gave acknowledgments to the customer. These drafts and cheques were forwarded by them to Louis Roederer, who then sent a receipt direct to the customer.

These facts appear to me to raise a question in regard to the nature of the trading connection between Louis Roederer and his customers in the United Kingdom which is not covered by any previous decision. In *Tischler* v. *Apthorpe* (1) and in *Pommery* v. *Apthorpe* (2), the foreign wine merchant traded in this country through an English agent, who sold his wine in England and received the price, making delivery to the buyer either from the stock which had been sent to him by his principal, or by directing a consignment to be sent from Reims. In *Werle & Co.* v. *Colquhoun* (3) the decision of the

(1) 52 L. T. (N.S.) 814. (2) 56 L. J. (Q.B.) 155.
(3) 20 Q. B. D. 753.

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Court of Appeal was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagne through his English agent. *Erichsen* v. *Last* (1), although it did not relate to the wine trade, was a decision of the same class. The telegraph company whose profits were assessed to income tax had its principal seat of business in Copenhagen, but it had offices and agents in various parts of the United Kingdom, where its agents made contracts for the transmission of messages through its wires, and received payment for sending them. I agree with the opinion expressed in that case (2) by Cotton L.J., that whenever a foreigner, either by himself or through a representative in this country, "habitually does, and contracts to do, a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business," and that the profits or gains arising from these transactions in the United Kingdom are liable to income tax.

There is, in my opinion, a very broad distinction between the case of a foreigner making contracts in England with his English customers for the sale of his wines, either personally or through a representative, and the case of his making similar contracts with these customers in his own country. In the present instance the orders forwarded to Louis Roederer were, in law, nothing more than offers to purchase until the contract between him and each offerer was completed by his acceptance at Reims; and he fulfilled his part of the contract by making delivery of the wine sold to the purchaser, and at his risk, in Reims. The trade of Louis Roederer consists in the sales of his champagne, and it is from these sales that his profits or gains are derived. Accordingly, the first and main question to be considered in this appeal is, whether that which was actually done within the United Kingdom in relation to and for the promotion of his business by Louis Roederer, or by the appellants on his behalf, amounts to an exercise of his trade within the meaning of Sched. D.

There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected

(1) 8 Q. B. D. 414. (2) 8 Q. B. D. 414, at p. 420.

with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of Sched. D. In illustration of that view, I may refer to *Sulley* v. *Attorney-General* (1), which was decided in the Exchequer Chamber by no less than six very eminent judges. An American firm carried on a business in New York, which consisted in the resale there of goods purchased on their account in England. One of the partners, who resided in Nottingham, bought the goods required by his firm, and paid for them with money remitted to him from New York. It was held, in these circumstances, that the firm did not exercise its trade in the United Kingdom in such sense as to bring its profits within the scope of the Income Tax Acts. One reason assigned for the decision was that the firm's transactions here did not involve any profits or gains, which were wholly dependent upon the resales effected by the firm on the other side of the Atlantic. The learned judges recognised the principle that purchasing of stock in this country, with the view of trading in it elsewhere, does not of itself constitute an exercise of the trade in the United Kingdom when that department of the business from which profits or gains are directly realized is carried on in another country.

If any substantial distinction could be drawn between canvassing through agents in this country for orders which are sent to Reims for acceptance or rejection, and the systematic purchase of goods in the English market for the purpose of trading with them in America, I am disposed to think that the distinction would not be unfavourable to the contention of the present appellants. There is no substantial difference between obtaining orders for wines, according to the method pursued by Louis Roederer, and attracting customers to Reims by advertising, and sending circulars to the trade in England. Such things are done by British merchants in foreign countries, and are also done by foreign merchants in Britain, in the interest and for the promotion of their home business. If their business consists, as that of Louis Roederer does, in the sale of wines or other merchandise, neither the British nor the foreign merchant

(1) 5 H. & N. 711.

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can, in my opinion, be said to exercise his trade beyond the limits of his own country, so long as all contracts for the sale of their goods and all deliveries to the purchaser are made within these limits.

The fact that some payments were made in cash to the appellants, and that they also received and forwarded drafts indorsed to Louis Roederer by buyers of his champagne, although it might have been of importance if he had exercised his trade in this country, does not appear to me to have a material bearing upon the question already discussed. When a trade is carried on in a foreign country, and British customers not only purchase but take delivery there, I do not think that the employment of an English agent to collect and remit the debts due to him by these purchasers can be regarded as an exercise of his trade in this country by the foreign merchant.

I am therefore of opinion that your Lordships ought to reverse the judgments of the Appeal Court and of the Queen's Bench Division, and to find and declare that Louis Roederer did not, in the years 1884, 1885, and 1886, exercise his trade in the United Kingdom. In that view, it becomes unnecessary to consider the question whether the appellants, as his agents, are responsible in terms of s. 41 of the Act of 1842. But, having heard a full argument upon the point, I desire to say that I am not prepared to hold, with the learned judges in the Courts below, that the words "having the receipt of any profits or gains" as they occur in that clause refer only to a "receiver." The context of the Act appears to me to indicate that they ought to be read as applicable to each and all of the persons enumerated.

LORD MACNAGHTEN. My Lords, I have had an opportunity of considering the judgments which have already been delivered by my noble and learned friends, and I have nothing to add except that I concur in the motion proposed, and for the reasons which have been stated.

LORD MORRIS. My Lords, I am of opinion that the judgment of the Court of Appeal, affirming the judgment of the

Queen's Bench Division, should be affirmed. It is unnecessary for me to repeat all the facts of the case. The first and main question is, Did Louis Roederer exercise a trade in England? There can be no definition of the words "exercising a trade." It is only another mode of expressing "carrying on a business"; but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, and that it cannot apply to isolated transactions. There is no special legal meaning to the words "exercising a trade," and it must be considered with regard to what would be its ordinary or popular meaning, and that must in each case depend on the facts of that particular case; and we are not to canvass what might be a logical outcome from any decision when it is the facts of the particular case that are solely decided on. I have heard no suggestion of any plainer or more intelligible meaning for the words "exercise his trade" than the words themselves convey.

Now, the leading facts of the case are: Roederer is an extensive wine maker at Reims, in France. He ships, and for years has shipped, large quantities of champagne to England. The appellants are his agents in England. The offers or proposals for the purchase of Roederer's wines are sought for and received by the appellants from customers as such agents. As between Roederer and the appellants, he reserves the right to reject any particular order—a right stated in the case as intended to protect Roederer in cases of doubt of the solvency of the customer. No special notice is given to the customer of such right being reserved. The invoices of the wine when shipped are sent by Roederer to the appellants, who forward them to the customers. Direct payments by draft or order are made to Roederer more frequently than they are made to the appellants, and the receipts are sent by Roederer direct to the customers. Exhibits 1, 2, and 5 shew the mode of dealing. Exhibit 5 gives the initiation of the transaction: it is addressed by the appellants to the proposed customer, and states they are instructed by their principal, Roederer, to inform him, &c.; it then goes on to say, "Mr. L. Roederer will be prepared to ship champagne," and solicits orders for the wines now offered by

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Mr. Roederer at the prices referred to in an accompanying list. Roederer's stamp is affixed at the foot. Exhibit No. 1 shews an order addressed to the appellants and requesting shipment, while Exhibit No. 2 gives the reply of the appellants thus: "In *compliance* with your obliging order of yesterday we shall have much pleasure in requesting Mr. L. Roederer to ship for your account," &c. These exhibits thus evidence an offer by the appellants as the agent of Roederer of wines at fixed prices, an order from the customer for a certain quantity, and an acceptance by the appellants. There is thus a completed contract between the customer and Roederer through his agents, the appellants, controlled perhaps by the limit of authority given by Roederer to the appellants, which limit is unknown to the customer. The question in this case is not whether the customer could recover from Roederer on any breach of the contract by reason of the limit of authority, but whether as a matter of fact Roederer is exercising his trade, in other words carrying on business in England. I am very clearly of opinion on the facts that he is exercising his trade in England, and I consider the insertion in the Directory is a most material and important fact, for the appellants, with whom we are dealing, authorize the statement in the Post Office Directory under the head of "Trades—Wine Merchants," as follows: "Roederer, Louis, Reims, champagne merchant (Grainger & Son, agents), 21, Mincing Lane, E.C."—an averment by the appellants that Roederer carries on the business of a wine merchant at 21, Mincing Lane, and that they are his agents there. On the facts stated in the special case I entertain no doubt, as the Queen's Bench Division and the Court of Appeal entertain no doubts, but that Louis Roederer exercises his trade of a wine merchant within the United Kingdom, to wit, in London.

On the other question, whether the appellants were agents within the terms of s. 41 of 5 & 6 Vict. c. 35, I am not prepared to hold that the words "having the receipt of any profits or gains" are applicable only to their immediate antecedent word a "receiver," and are not applicable to the word "agent." I consider they are applicable to and control the word "agent" as well as the word "receiver," and there is no reason why an

agent should be chargeable who was not in receipt of profits or gains; but in the present case the appellants were in fact, as agents of their principal, Roederer, in receipt of moneys which included profits and gains, and, being so, come within the operation of s. 41 of 5 & 6 Vict. c. 35.

LORD DAVEY. My Lords, I am of opinion that this appeal should be allowed, for the reasons which have been already stated by your Lordships who first addressed the House; and were it not that we are differing from the Court below, and that your Lordships are not unanimous, I should not find it necessary to add any observations of my own.

The question is whether, on the facts found in the original and amended cases stated by the commissioners, Mr. Roederer exercises a trade within the United Kingdom within the meaning of s. 2, Sched. D of the Income Tax Act, 1853. I need not again analyze in detail the statements in the cases; but I will merely state that the substance and effect of them appears to my mind to be shortly this: First, neither Messrs. Grainger & Son nor the sub-agents appointed by them have any authority to make contracts for the sale of Mr. Roederer's wines. Their function in this part of the business is confined to soliciting and collecting orders for wine which are forwarded to him in Reims for execution by him if he thinks fit. Secondly, all contracts for the sale of wine are made in Reims by Mr. Roederer himself, and the goods are invoiced in his name to the customer. In every instance they are delivered free on board at Reims at the expense and risk of the customer. Thirdly, the ordinary course is for the customers to pay Mr. Roederer direct in Reims by cheques or drafts to his order. But Messrs. Grainger and Son receive some cash and cheques on Mr. Roederer's account in London, though to an amount which rarely exceeds the commission due to them. Receipts for all money paid, either to Mr. Roederer or through Messrs. Grainger & Son, are sent by Mr. Roederer to the customers direct. A form of receipt is annexed to the amended case.

Now, what does one mean by a trade, or the exercise of a trade? Trade in its largest sense is the business of selling,

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with a view to profit, goods which the trader has either manufactured or himself purchased. I cannot doubt, upon the facts found, that all Mr. Roederer's sales to his English customers are made at Reims for delivery in that place, and the goods sold are, in fact, delivered to the customers in Reims. So far as I can see, not a single bottle of wine is ever sold or delivered by Mr. Roederer, either personally or through his agents, in this country. It was, I think, admitted, and it cannot, in my opinion, be denied, that the mere fact of a foreigner selling his goods to English customers does not constitute an exercise of his trade within this country, although he is trading with this country. But it was argued that the habitual employment of agents to obtain orders and transmit them abroad constitutes the act of selling to English customers an exercise of trade in this country. I am unable to accede to that argument. Canvassing for custom is no doubt ancillary to the exercise of trade, and it may be assumed that Mr. Roederer's trade with this country is increased by the employment of agents for that purpose, as it might be by systematic advertisement. But Mr. Roederer's trade is selling his champagne; and he exercises that trade where he makes his sales and the profits come home to him. Nor do I think it makes any difference that it is within the scope of Messrs. Grainger's authority to collect moneys for Mr. Roederer to the extent stated in the case. It is, in my opinion, no more than if Mr. Roederer were for the convenience of his customers to open a banking account in London to which they might pay what they owe him.

I forbear to comment on the earlier cases which have been decided on this section, because they all differ in the vital respect that sales of goods were in those cases made in England. The case of *Sulley* v. *Attorney-General* (1), so far as it goes, is in the appellants' favour.

In the view which I take it is not necessary to decide the other point which has been raised, whether Messrs. Grainger & Son are such agents as described in sect. 41 of the Act of 1842. I will only say that I think the words "having the receipt of any profits or gains," &c., should grammatically be read with

(1) 5 H. & N. 711.

the words "factor, agent, or receiver," and not with "receiver" only; and that "having the receipt of any profits or gains" does not mean "any part of the profits or gains," but "the taxable profits or gains of any business," &c. I feel great doubt whether, on the facts of the present case, Messrs. Grainger & Son were such agents; but it is not necessary to decide that.

Orders appealed from and determination of the Commissioners reversed with costs here and below; with a declaration that Louis Roederer was not a person exercising a trade within the United Kingdom in the terms of Sched. D of 16 *&* 17 *Vict. c.* 34; *cause remitted to the Queen's Bench Division.*

Lords' Journals, May 1, 1896.

Solicitors for appellants: *Irvine & Borrowman.*

Solicitor for respondent: *F. C. Gore, Solicitor of Inland Revenue.*

Applied. CANADIAN PACIFIC RY. CO. *v.* ATT.-GEN. FOR B.C. AND ATT.-GEN FOR CANADA [1950] A. C. 122

[PRIVY COUNCIL.]

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Aug. 1, 2, 6, 7.
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May 9.

ATTORNEY-GENERAL FOR ONTARIO APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION, AND THE DISTILLERS AND BREWERS' ASSOCIATION OF ONTARIO . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, ss. 91, 92—*Distribution of Legislative Powers—Liquor Laws—Power of Prohibition—Canada Temperance Act*, 1886—*Ontario Act* (53 *Vict. c.* 56), *s.* 18.

The general power of legislation conferred upon the Dominion Parliament by s. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c. 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada;

Russell v. *Reg.* (7 App. Cas. 829) followed;

but not as regulating trade and commerce within s. 91, sub-s. 2, of the Act of 1867;

Citizens' Insurance Co. v. *Parsons* (7 App. Cas. 98) distinguished and *Municipal Corporation of Toronto* v. *Virgo* (ante, p. 93) followed.

Held, also, that the local liquor prohibitions authorized by the Ontario

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* *Present:* LORD HALSBURY L.C., LORD HERSCHELL, LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

Act (53 Vict. c. 56), s. 18, are within the powers of the provincial legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886.

APPEAL by special leave from a judgment of the Supreme Court (Jan. 15, 1895) consisting of Strong C.J., Fournier, Gwynne, Sedgwick, and King JJ. Under the Supreme and Exchequer Courts Act (Revised Stat. Can. c. 135), as amended by Dominion Act (54 & 55 Vict. c. 25), s. 4, the Governor-General of Canada, by Order in Council (Oct. 26, 1893), submitted to the Supreme Court of Canada the following questions :—

(1.) Has a provincial legislature jurisdiction to prohibit the sale within the province of spirituous, fermented, or other intoxicating liquors?

(2.) Or has the legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

(3.) Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

(4.) Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

(5.) If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail, according to the definition of a sale by retail either in statutes in force in the province at the time of confederation, or any other definition thereof?

(6.) If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of the Canada Temperance Act, or any of them (Revised Statutes of Canada, 49 Vict. c. 106, s. 99)?

(7.) Has the Ontario Legislature jurisdiction to enact s. 18 of Ontario Act, 53 Vict. c. 56, intituled "An Act to improve the Liquor Licence Acts," as said section is explained by Ontario Act, 54 Vict. c. 46, intituled "An Act respecting local option in the matter of liquor selling"?

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Sect. 18, referred to in the last of the said questions, is as follows:—

"18. Whereas the following provision of this section was at the date of confederation in force as a part of the Consolidated Municipal Act (29th and 30th Victoria, chapter 51, section 249, sub-section 9), and was afterwards re-enacted as sub-section 7 of section 6 of 32nd Victoria, chapter 32, being the Tavern and Shop Licence Act of 1868, but was afterwards omitted in subsequent consolidations of the Municipal and the Liquor Licence Acts, similar provisions as to local prohibition being contained in the Temperance Act of 1864, 27th and 28th Victoria, chapter 18; and the said last-mentioned Act having been repealed in municipalities where not in force by the Canada Temperance Act, it is expedient that municipalities should have the powers by them formerly possessed; it is hereby enacted as follows:—

"The council of every township, city, town, and incorporated village may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment. Provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the Legislature of the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal."

Act 54 Vict. c. 46, referred to above, declares that s. 18 was not intended to affect the provisions of s. 252 of the Consolidated Municipal Act, being Canada Act, 29 & 30 Vict. c. 51.

A majority of the Supreme Court, after hearing counsel for the Dominion, the provinces of Ontario, Quebec, and Manitoba, and also, under s. 37, sub-s. 4, of the Supreme and Exchequer Courts Act for the Distillers and Brewers' Association of Ontario,

answered all the questions in the negative. Strong C.J. and Fournier J., while agreeing in a negative answer to questions 3 and 4, answered the remainder in the affirmative.

The case in the Court below is reported in 24 Sup. Ct. Can. Reports, p. 170.

Maclaren, Q.C. (of the Colonial Bar), and *Haldane, Q.C.*, for the appellant.

Newcombe, Q.C. (of the Colonial Bar), and *Loehnis*, for the Attorney-General for the Dominion.

Blake, Q.C., and *Wallace Nesbitt* (both of the Colonial Bar), for the Distillers and Brewers' Association.

Maclaren, Q.C., and *Haldane, Q.C.*, contended that s. 18 of the Ontario Act of 1890 was authorized as relating to a subject comprised within the term "municipal institutions" in s. 92, sub-s. 8, of the British North America Act, 1867. *Citizens' Insurance Co.* v. *Parsons* (1) lays down the rule that provincial legislation is valid if it relates to the enumerated subjects in s. 92, and is not overriden by the enumerated subjects in s. 91. It was admitted that a provincial legislature could not give to a municipality control over any of the subjects mentioned in s. 91. But a power to create municipal institutions must involve a power to give them such powers as usually belong to such bodies. In Canadian legislation, prior to the Imperial Act of 1867, municipal institutions included a large number of subjects not specifically enumerated in s. 92. The expression had acquired a well-defined legislative meaning, and the term was used in s. 92 in the sense so acquired. The Act of 1867 was founded on the Quebec resolutions, and expressions which came textually therefrom should be interpreted by the light of Canadian legislation.

[THE LORD CHANCELLOR. Then how do you define that technical meaning?]

It meant the conferring on them such powers as under Canadian legislation had been understood to belong to them; except such as were assigned to the Dominion under s. 91.

[LORD HERSCHELL. Canadian legislation varied. Municipal

(1) 7 App. Cas. 96.

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institutions had different powers in Canada from what they had in Nova Scotia and New Brunswick.]

Reference was made to *Hodge* v. *Reg.* (1) and *Russell* v. *Reg.* (2), and to a series of Canadian statutes passed before 1867, being, as respects those relating to Upper Canada, 12 Vict. c. 81; 16 Vict. c. 184; 22 Vict. c. 99, s. 245; Cons. Stat. Upper Canada of 1859, c. 54, s. 246; 29 & 30 Vict. c. 51; and as relating to Lower Canada—16 Vict. c. 214; 18 Vict. c. 100, s. 23; 19 & 20 Vict. c. 101, ss. 8, 11; 20 Vict. c. 129, s. 37; Cons. Stat. L. C. 1861, c. 24, s. 26, sub-ss. 10, 15, and s. 27, sub-s. 16. Reference was also made to 27 & 28 Vict. c. 18; 29 & 30 Vict. c. 32; Revised Stat. Nova Scotia, c. 75; Public Stat. of New Brunswick (1854), c. 15. The expression has also been interpreted in decided cases: see *Slavin* v. *Corporation of Orillia* (3); *Reg.* v. *Taylor* (4); *Keefe* v. *McLennan* (5); *In re Local Option Act* (6); *Corporation of Huntingdon* v. *Moir* (7); *Lepine* v. *Laurent* (8); *Huson* v. *S. Norwich.* (9) Sub-sects. 9, 13, and 16 of s. 92 were also relied on. It was further contended that the Act in question was valid unless and until the Dominion Parliament should legislate in a manner which would override its provisions. It does not conflict with Canada Temperance Act, 1878, for it could only apply to places where that Act has not been put in force. Reference was made to *L'Union St. Jaques de Montréal* v. *Bélisle* (10); *Attorney-General of Ontario* v. *Attorney-General for Canada* (11); *Bank of Toronto* v. *Lambe.* (12) The general result of the authorities is that the words "regulation of trade and commerce" in s. 91 mean general regulation in a broad sense; not of such specific matters as are involved in the Act in question, nor of any minute details, nor any regulation of matters of a merely local nature or private or peculiar to any particular trade.

(1) 9 App. Cas. 117.
(2) 7 App. Cas. 829.
(3) 36 U. C. Q. B. 159; S.C. 1 Cart. 688.
(4) 36 U. C. Q. B. 183.
(5) 2 Cart. 400, 409.
(6) 18 Ont. App. R. 572.
(7) 7 Montreal L. R. Q. B. 281.
(8) 14 Legal News, 369.
(9) 24 Sup. Ct. Can. Rep. 145.
(10) L. R. 6 P. C. 31.
(11) [1894] A. C. 189.
(12) 12 App. Cas. 575.

Newcombe, Q.C., contended that a provincial legislature has no authority to prohibit the sale, manufacture, or importation of spirituous, fermented, or other intoxicating liquors. Further, that it has no authority to prohibit the sale of such liquors either by wholesale or retail, or subject to the exemptions established by the Canada Temperance Act, s. 99. The subject of this reference is prohibition. *Russell* v. *Reg.* (1) ruled that prohibition as dealt with by the Canada Temperance Act was excluded from provincial authority.

[LORD HERSCHELL. No; not while the provincial legislature deals with the matter locally.]

Prohibition of the liquor traffic does not fall within any of the subjects enumerated in s. 92. The exclusive power with regard to municipal institutions only enables the legislatures to establish regulations for carrying on such institutions. Any authority which the legislatures can confer upon them must be derived from or have relation to the other subjects enumerated in s. 92, none of which include a power to prohibit. They can prescribe the mode in which the traffic may be carried on, but they cannot prohibit it. Sub-sect. 16, s. 92, relates to "local or private" matters, not provincial. On the other hand, prohibition strictly relates to matters within the exclusive power of the Dominion Parliament. It affects the peace, order, and good government of Canada in relation to matters not coming within those assigned by s. 92 to the provinces. To the Dominion is assigned authority to regulate trade and commerce. See *City of Fredericton* v. *Reg.* (2), *Russell* v. *Reg.* (1), and *Tennant* v. *Union Bank.* (3) It was contended that whether or not regulation involves prohibition, if the provinces may prohibit, the Dominion has nothing left to regulate. The provincial power of regulating a particular trade recognised in *Hodge* v. *Reg.* (4) must not be pushed so as to conflict with Dominion legislation; for wherever the two legislatures conflict that of the Dominion must be paramount. Here the field of legislation, that is with regard to the prohibition of the liquor traffic, is already occupied by the Canada Temperance

(1) 7 App. Cas. 829.
(2) 3 Sup. Ct. Can. 505.
(3) [1894] A. C. 45.
(4) 9 App. Cas. 117.

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Act, and there is therefore no room for a provincial law, for the interference of the province would interfere with the legislation of the Dominion.

[LORD WATSON. Where the Temperance Act is not adopted, there is no law as yet applicable, and there the field is not covered.]

The legislation exists which at any moment the community may bring into force.

Blake, Q.C., contended that the provinces have no legislative authority except in the subjects enumerated in s. 92, according to the true construction of the British North America Act as ascertained by the Privy Council. On any matter so enumerated the provinces have no authority in any case wherein, or to any extent whereby, the exercise of such authority would interfere with the exercise by the Dominion of any authority comprised within any of the sub-sections of s. 91. Again, the subject of the prohibition of retail selling of intoxicating liquors is not comprised within s. 92 according to the same authoritative construction; and it follows that a fortiori the prohibition of wholesale selling, or manufacturing or importing, is not so comprised. Then it is settled that each of these subjects, being without the scope of s. 92, is within the general authority of the Dominion conferred by s. 91 for peace, order, and good government. The regulation of trade and commerce is placed by s. 91 under the exclusive authority of the Dominion, the object being to place the trade of the various provinces under the general control of the central authority, and thus effect uniformity as far as possible, and also enable the Dominion to obtain by an indirect system of taxation the amounts necessary to enable it to discharge the national obligations. The customs and excise duties on liquor are a substantial and necessary part of the fiscal resources of the Dominion, and it was not intended that those resources should be curtailed or abolished by the provincial legislatures throughout their jurisdiction. Exclusive authority over the liquor trade in its trade and revenue aspects means an authority to prevent any rival control over them which might impede the purposes for which such exclusive authority was granted. Besides, there is a broad distinction between an

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authority to prohibit a trade and an authority to regulate it, and even if, according to the appellant's argument, the provincial legislature could, under the sub-section relating to municipal institutions, regulate it, the power to prohibit nevertheless exclusively belongs to the Dominion. Sect. 18 of the Ontario Act purports to deal with a subject which comes under s. 91, sub-s. 2. It conflicts with the Canada Temperance Act, which covers the whole field of legislation, and therefore with the paramount authority of the Dominion, and, moreover, cannot be validated as a revival of pre-confederation law. Before confederation each province had full legislative authority, and one of them tried the experiment of entrusting municipalities with prohibitive power. But neither in the practice of the four provinces, nor in the nature of the subject, nor in the methods of the United Kingdom, is there any established meaning attached to the phrase "municipal institutions" which includes the subject of s. 18. Reference was made to *Reg.* v. *Justices of Kings* (1) and *Severn* v. *Reg.* (2), and to the cases cited by the appellant.

Maclaren, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of counsel on both sides of the Bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic which were passed by the Legislature of the old province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the Legislature of Ontario respectively.

At the time when the British North America Act of 1867 came into operation, the statute book of the old province contained two sets of enactments applicable to Upper Canada,

(1) 2 Pugs. 535.

(2) 2 Sup. Ct. Can. 70.

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which, though differing in expression, were in substance very similar.

The most recent of these enactments were embodied in the Temperance Act, 1864 (27 & 28 Vict. c. 18), which conferred upon the municipal council of every county, town, township, or incorporated village, "besides the powers at present conferred on it by law," power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licences therefor, within the limits of the municipality. Such by-law was not to take effect until submitted to and approved by a majority of the qualified electors; and provision was made for its subsequent repeal in deference to an adverse vote of the electors.

The previous enactments relating to the same subject, which were in force at the time of the Union, were contained in the Consolidated Municipal Act, 29 & 30 Vict. c. 51. They empowered the council of every township, town, and incorporated village, and the commissioners of police in cities, to make by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, had been duly approved by the electors of the municipality in the manner prescribed by the Act. After the Union, the Legislature of Ontario inserted these enactments in the Tavern and Shop Licence Act, 32 Vict. c. 32. They were purposely omitted from subsequent consolidations of the Municipal and Liquor Licence Acts; and, in the year 1886, when the Canada Temperance Act was passed by the Parliament of Canada, there was no provincial law authorizing the prohibition of liquor sales in Ontario save the Temperance Act, 1864.

The Canada Temperance Act of 1886 (Revised Statutes of Canada, 49 Vict. c. 106) is applicable to all the provinces of the Dominion. Its general scheme is to give to the electors of every county or city the option of adopting, or declining to adopt, the provisions of the second part of the Act, which make it unlawful for any person "by himself, his clerk, servant or

agent, to expose or keep for sale, or directly or indirectly, on any pretence or upon any device, to sell or barter, or in consideration of the purchase of any other property, give to any other person any intoxicating liquor." It expressly declares that no violation of these enactments shall be made lawful by reason of any licence of any description whatsoever. Certain relaxations are made in the case of sales of liquor for sacramental or medicinal purposes, or for exclusive use in some art, trade, or manufacture. The prohibition does not extend to manufacturers, importers, or wholesale traders who sell liquors in quantities above a specified limit, when they have good reason to believe that the purchasers will forthwith carry their purchase beyond the limits of the county or city, or of any adjoining county or city in which the provisions of the Act are in force.

For the purpose of bringing the second part of the Act into operation an order of the Governor-General of Canada in Council is required. The order must be made on the petition of a county or city, which cannot be granted until it has been put to the vote of the electors of such county or city. When a majority of the votes polled are adverse to the petition, it must be dismissed; and no similar application can be made within the period of three years from the day on which the poll was taken. When the vote is in favour of the petition, and is followed by an Order in Council, one-fourth of the qualified electors of the county or city may apply to the Governor-General in Council for a recall of the order, which is to be granted in the event of a majority of the electors voting in favour of the application. Power is given to the Governor-General in Council to issue in the like manner, and after similar procedure, an order repealing any by-law passed by any municipal council for the application of the Temperance Act of 1864.

The Dominion Act also contains an express repeal of the prohibitory clauses of the provincial Act of 1864, and of the machinery thereby provided for bringing them into operation, (1.) as to every municipality within the limits of Ontario in which, at the passing of the Act of 1886, there was no municipal by-law in force, (2.) as to every municipality within these limits

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in which a prohibitive by-law then in force shall be subsequently repealed under the provisions of either Act, and (3.) as to every municipality having a municipal by-law which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void.

With the view of restoring to municipalities within the province whose powers were affected by that repeal the right to make by-laws which they had possessed under the law of the old province, the Legislature of Ontario passed s. 18 of 53 Vict. c. 56, to which the seventh question in this case relates. The enacting words of the clause are introduced by a preamble which recites the previous course of legislation, and the repeal by the Canada Temperance Act of the Upper Canada Act of 1864 in municipalities where not in force, and concludes thus: "it is expedient that municipalities should have the powers by them formerly possessed." The enacting words of the clause, with the exception of one or two changes of expression which do not affect its substance, are a mere reproduction of the provisions, not of the Temperance Act of 1864, but of the kindred provisions of the Municipal Act (29 & 30 Vict. c. 51), which had been omitted from the consolidated statutes of the province. A new proviso is added, to the effect that "nothing in this section contained shall be construed into an exercise of jurisdiction by the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal. The Legislature of Ontario subsequently passed an Act (54 Vict. c. 46) for the purpose of explaining that s. 18 was not meant to repeal by implication certain provisions of the Municipal Act (29 & 30 Vict. c. 51), which limit its application to retail dealings.

The seventh question raises the issue, whether, in the circumstances which have just been detailed, the provincial legislature had authority to enact s. 18. In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada

Temperance Act; and, if so, to consider in the second place, whether, after that Act became the law of each province of the Dominion, there yet remained power with the Legislature of Ontario to enact the provisions of s. 18.

The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good government of Canada," within the meaning of the introductory and general enactments of s. 91 of the British North America Act; and, in the second place, upon the ground that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These sources of jurisdiction are in themselves distinct, and are to be found in different enactments.

It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are primâ facie committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* (1) that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that

(1) 7 App. Cas. 108.

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the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. of Canada* v. *Parsons* (1) and in *Cushing* v. *Dupuy* (2); and it has been recognised by this Board in *Tennant* v. *Union Bank of Canada* (3) and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion.* (4)

The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.

(1) 7 App. Cas. at pp. 108, 109.
(2) 5 App. Cas. 409, 415.
(3) [1894] A. C. 31, 46.
(4) [1894] A. C. 189, 200.

To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

In construing the introductory enactments of s. 91, with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that s. 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An

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Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

The judgment of this Board in *Russell* v. *Reg.* (1) has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act had been adopted. But the provisions of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *Reg.* (1) must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the "regulation of trade and commerce" within the meaning of No. 2 of s. 91. If it were so, the Parliament of Canada would,

(1) 7 App. Cas. 829.

under the exception from s. 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of s. 91 were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons* (1), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in *Municipal Corporation of the City of Toronto* v. *Virgo* (2) in these terms: "Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

The authority of the Legislature of Ontario to enact s. 18 of 53 Vict. c. 56, was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of s. 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed

(1) 7 App. Cas. 96. (2) Ante, p. 93.

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and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of s. 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation, the Legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8.

Their Lordships are likewise of opinion that s. 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer and other licences, in order to the raising of a revenue for provincial, local or municipal purposes." It was held by this Board in *Hodge* v. *Reg.* (1) to include the right to impose reasonable conditions upon the licencees which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.

The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1.) "property and civil rights in the province," and (2.) "generally all matters of a merely local or private nature in the province." A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the pro-

(1) 9 App. Cas. 117.

vince. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling primâ facie within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed.

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.

In the able and elaborate argument addressed to their Lordships on behalf of the respondents it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada as being within the regulation of trade and commerce. In that case the subject, in so far at least as it had been regulated by Canadian legislation, would, by virtue of the concluding enactment of s. 91, be excepted from the matters committed to provincial legislatures by s. 92. Upon the assumption that s. 91 (2) does not embrace the right to suppress a trade, Mr. Blake maintained that, whilst the restriction of the liquor traffic

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may be competently made matter of legislation in a provincial as well as a Canadian aspect, yet the Parliament of Canada has, by enacting the Temperance Act of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy raised by the question with which they are at present dealing; and, before discussing the point, it may be expedient to consider the relation in which Dominion and provincial legislation stand to each other.

It has been frequently recognised by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by s. 129 of the British North America Act, "until repealed, abolished, or altered by the Parliament of Canada, or by the provincial legislature," according to the authority of that Parliament, "or of that legislature." It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion, in *Dobie* v. *Temporalities Board* (1), to consider the power of repeal competent to the legislature of a province. In that case the Legislature of

(1) 7 App. Cas. 136.

Quebec had repealed a statute continued in force after the Union by s. 129 which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held (1) that the powers conferred "upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867"; and that it was beyond the authority of the Legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or, in other words, for the province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. In the present case the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario; and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province. In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament.

The question must next be considered whether the provincial enactments of s. 18 to any, and if so to what, extent come into collision with the provisions of the Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it.

The prohibitions of the Dominion Act have in some respects an effect which may extend beyond the limits of a province, and they are all of a very stringent character. They draw an arbitrary line, at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view

(1) 7 App. Cas. at p. 147.

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of discriminating between wholesale and retail transactions. Below the limit, sales within a district which has adopted the Act are absolutely forbidden, except to the two nominees of the Lieutenant-Governor of the province, who are only allowed to dispose of their purchases in small quantities for medicinal and other specified purposes. In the case of sales above the limit the rule is different. The manufacturers of pure native wines, from grapes grown in Canada, have special favour shewn them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature.

On the other hand, the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario. The first branch of its prohibitory enactments strikes against sales of liquor by retail in any tavern, or other house or other place of public entertainment. The second extends to sales in shops and places other than houses of public entertainment; but the context indicates that it is only meant to apply to retail transactions; and that intention is made clear by the terms of the explanatory Act 54 Vict. c. 46, which fixes the line between wholesale and retail at one dozen of liquor in bottles, and five gallons if sold in other receptacles. The importer or manufacturer can sell any quantity above that limit; and any retail trader may do the same, provided that he sells the liquor in the original packages in which it was received by him from the importer or manufacturer.

It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at

one and the same time. In the opinion of their Lordships the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both. Neither statute is imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of a majority of the electors in a district or municipality. In *Russell* v. *Reg.* (1) it was observed by this Board, with reference to the Canada Temperance Act of 1878, "The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it." No fault can be found with the accuracy of that statement. Mutatis mutandis, it is equally true as a description of the provisions of s. 18. But in neither case can the statement mean more than this, that, on the passing of the Act, each district or municipality within the Dominion or the province, as the case might be, became vested with a right to adopt and enforce certain prohibitions if it thought fit to do so. But the prohibitions of these Acts, which constitute their object and their essence, cannot with the least degree of accuracy be said to be in force anywhere until they have been locally adopted.

If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass s. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by s. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the

(1) 7 App. Cas. at p. 841.

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Canadian Act are not and may never be in force. In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll; and it hardly admits of doubt that there could be no repugnancy whilst the option given by the Canadian Act was suspended. The Parliament of Canada has not, either expressly or by implication, enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized the provincial parliament is to be debarred from exercising the legislative authority given it by s. 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a grave question whether it would be lawful. Even if the provisions of s. 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force, the prohibitions of the Canadian Act.

Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario Legislature had jurisdiction to enact s. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886.

Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case left to speculation. It must, therefore, be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as

their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question.

Answers to questions 1 and 2.—Their Lordships think it sufficient to refer to the opinions expressed by them in disposing of the seventh question.

Answer to question 3.—In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shewn that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

Answer to question 4.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

Answers to questions 5 and 6.—Their Lordships consider it unnecessary to give a categorical reply to either of these questions. Their opinion upon the points which the questions involve has been sufficiently explained in their answer to the seventh question.

Their Lordships will humbly advise Her Majesty to discharge the order of the Supreme Court of Canada dated January 15, 1895; and to substitute therefor the several answers to the seven questions submitted by the Governor-General of Canada which have been already indicated. There will be no costs of this appeal.

Solicitors for appellant: *Freshfields & Williams.*

Solicitors for first respondent: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for second respondent: *Linklater, Hackwood, Addison & Brown.*

[PRIVY COUNCIL.]

J. C.* 1896 March 3, 20.

HIDDLE AND ANOTHER . . . . . PLAINTIFFS;

AND

NATIONAL FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND. } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Compliance with Condition in Policy—Non-suit.

Where, in an action on a fire policy, the plaintiffs' evidence shewed that they could have complied with the condition as to giving within fifteen days a detailed account of their loss "as the nature and circumstances of the case will admit" much more fully and completely than they had done:—

Held, that they were rightly non-suited, since even if the question of compliance were for the jury, a verdict could not have been reasonably given in their favour.

APPEAL from a decree of the Supreme Court (Feb. 11, 1895), refusing a rule nisi to set aside a non-suit and for a new trial.

The facts are stated in the judgment of their Lordships.

Bigham, Q.C., and *C. C. Scott*, for the appellants, contended that the evidence in this case ought to have been left to the jury. The question whether the account delivered was an account within the meaning of the condition, and the further question whether the account was as detailed as the nature and circumstances of the case admitted, were both of them questions for the jury, and the judge was not authorized to withdraw from the jury the consideration of the evidence on which they depended. [Reference was made to *Roper* v. *London* (1); *Fitch* v. *Liverpool and London Co.* (2); *Carnofsky* v. *New Zealand Insurance.* (3)]

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

(1) 28 L. J. (Q.B.) 260. (2) 1 N. S. W. R. 89, 269.
(3) 14 N. S. W. R. 102.

Asquith, Q.C., and *Upjohn*, for the respondents, were not heard.

1896. March 20. The judgment of their Lordships was delivered by

LORD DAVEY. This appeal arises out of an action by the insured against the insurers on a policy of fire insurance. The policy in question is dated November 15, 1893, and thereby the respondents insured the appellants against loss or damage by fire "on stock-in-trade of general store-keepers, as follows, viz., boots and shoes, 100*l.*; fancy crockery and stationery, 100*l.*; drapery and clothing, 600*l.*; ironmongery, 100*l.*; and grocery, 100*l.*—1000*l.*" on their premises in Chanter Street, Berrigan, in the colony of New South Wales, in the sum of 1000*l.*, subject to the conditions indorsed thereon. The sixth condition, on which the present question arises, was in the following words:—

"6. Statement and settlement of claims: The insured sustaining any loss or damage by fire shall forthwith give notice to the company in Dunedin, or to the recognised agent thereof, at or near the locality in which such loss or damage shall occur, and shall within fifteen days after such fire deliver to the same an account in detail of such loss or damage as the nature and circumstances of the case will admit; and shall verify the same by solemn declaration or affirmation before a magistrate, and shall produce books, vouchers, and such other information and evidence as the directors or agents of the company may reasonably require; and unless such account, verified as aforesaid, shall be delivered within the time aforesaid, and such other information and evidence, if required, shall be produced in manner aforesaid, no part of such loss shall be payable. No profit of any sort is to be included in the claim; and if there appeared to be any fraud, overcharge, or imposition, or any false declaration, or if the fire shall have happened by the procurement, or wilful act, means, or connivance of the assured or claimants, no benefit shall be recoverable under this policy. If the company elect, pursuant to clause 7 hereof, to replace or reinstate any property, the

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insured, at his own expense, shall produce and give to the company all such plans, specifications, particulars, books, and information (oral and documentary) as the company may require."

It appears that the appellants in March, 1893, had made an assignment for the benefit of their creditors, and on July 1 in that year they bought back from their trustees their then existing stock at the value of 1557*l.* They afterwards and before the date of the fire made further purchases of stock to the amount (it was said) including duty and freight of 1860*l.* 9*s.* 10*d.* In the course of their business they made sales partly for cash (in which case the amount received but not the particulars of the goods sold were entered in their cash-book) and partly on credit, the particulars of which last-mentioned sales appeared in their ledger.

The fire took place on January 10, 1894, when the whole stock of the appellants, with a trifling exception, was destroyed. Some of their books, including the cash-book and customers ledger were in a safe and were saved from the fire. The stock-book, however, and the stock-sheets of the end of 1893 were destroyed.

On January 24, 1894, the appellants, in assumed compliance with the sixth condition, forwarded to the respondents a statutory declaration that by the fire they had sustained loss amounting to 2250*l.* as per detailed statement marked B. This statement was in the following terms :—

Statement referred to.

Particulars of Items burnt.	Value at time of fire.	Present value.	Amount claimed.	Remarks.
	£		£	
Drapery and clothing . . .	1600		600	
Boots	200		100	
Fancy goods, crockery and stationery	150		100	
Ironmongery	150		100	
Grocery	150		100	
	£2250		£1000	

The respondents declined to accept this statement as sufficient compliance with the sixth condition or to recognise any liability in the matter. The present action was accordingly commenced by the appellants on May 8, 1894. The respondents (among other defences) by their eighth plea relied on the sixth condition.

At the trial before Stephen J. it appeared from the evidence of the appellant Hiddle that the goods in the store at the time of the fire were the goods they bought back plus the invoice goods purchased since minus the goods sold. There were in addition 40*l.* worth bought from one Paassvanti. The witness stated that the invoices of the goods purchased by them in Melbourne and Sydney were destroyed in the fire—that they had written to the vendors for copies of those invoices, but did not get them until after fifteen days from the fire. The appellants put in evidence (amongst other documents) a detailed inventory and valuation of the stock bought back by them from their trustees in July, 1893, and estimates prepared by their accountant from the materials in their possession after the fire, shewing how the amount of the loss was arrived at.

At the close of the plaintiffs' case the learned judge non-suited them on the authority of a case of *Carnofsky* v. *New Zealand Insurance* (1), where a condition in precisely similar terms to the sixth condition in the present case was in question. The non-suit was confirmed by the Supreme Court. The Chief Justice in his judgment referred to two earlier cases in that Court decided on similar conditions in 1862 and 1884, as well as to the more recent *Carnofsky Case* (1) referred to by Stephen J. This appeal is from the order of the Supreme Court.

It was contended on behalf of the appellants that they were only bound to give such an account as the nature and circumstances of the case would admit of, or (in other words) the best account they could, and that whether they had done so was a question of fact which ought to have been submitted to the jury. Their Lordships, however, accept the rule laid down by Willes J. in the case of *Ryder* v. *Wombwell* (2), and they think that the non-suit was proper, although there may have been

(1) 14 N. S. W. R. 102. (2) L. R. 4 Ex. 38.

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some evidence to go to the jury, if the proof was such that the jury could not reasonably give a verdict for the plaintiffs. In the present case their Lordships doubt whether the statement forwarded by the appellants was an account at all within the meaning of the sixth condition, and they consider it proved by the evidence of the plaintiffs themselves that at the time of forwarding their statement they had in their possession materials which enabled them to give a much fuller, more detailed, and better account for the purpose of enabling the insurance company to test the reality and extent of the loss.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Snow, Snow & Fox.*
Solicitors for respondents: *Bell, Brodrick & Gray.*

[PRIVY COUNCIL.]

J. C.* 1896 *March* 3; *May* 9.

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } INFORMANT;

AND

RENNIE . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Parliamentary Allowances to Members—53 Vict. No. 12, s. 2—Construction.

According to the true construction of the Parliamentary Representatives' Allowance Act (53 Vict. No. 12), s. 2, an annual grant to "every member of the Legislative Assembly now serving or hereafter to serve therein," applies to every successive Legislative Assembly of the colony, and is not limited to the particular Assembly existing at the date of the Act.

APPEAL from a decree of the Supreme Court (May 28, 1895), affirming a decree of Manning J., dismissing the appellant's information with costs.

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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The question decided in the appeal was whether Act 53 Vict. No. 12, is limited in its operation to the members of the particular Legislative Assembly existing at the date of the Act, or whether it extends to members of every Legislative Assembly from time to time existing.

Byrne, Q.C., Upjohn, and *F. Fitzgerald,* for the appellant, contended that the operation of the Act in question was limited to the members of the particular Assembly which existed at the date of its passing. Reference was made to the Imperial Act (18 & 19 Vict. c. 54), which contains in its schedule the Constitution Act of the colony, and to the local Act (37 Vict. No. 7), called the Triennial Parliaments Act, which repeals s. 21 of the Constitution Act and substitutes a three years' for a five years' duration of the Legislative Assembly. It was contended that both Acts contemplated a body of limited duration called into existence from time to time, and not a permanent and continuous body. The Act in question, therefore, must be construed as applying to the members of the particular Assembly existing at its date. If the construction were doubtful it must be construed in favour of the public and against the recipients of public moneys.

Sir Julian Solomons, Q.C. (New South Wales Bar), and *Vaughan Hawkins,* for the respondent, were not heard.

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May 9.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The question in this appeal relates to the construction of the "Parliamentary Representatives' Allowance Act" of the colony of New South Wales (No. 12 of 53 Victoria 1889). The second section is as follows: "Every member of the Legislative Assembly now serving or hereafter to serve therein shall, unless he is one of the persons specified or referred to in the next following section, be entitled to receive, by way of disbursement for expenses incurred by him in discharge of his parliamentary duties, an allowance at the rate of three hundred pounds per annum; which allowance shall be charged on the Consolidated Revenue Fund, and be payable monthly at the rate aforesaid to every such member of this present Legislative

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Assembly now serving from the date of the passing of this Act, and to every such member hereafter elected, from the time of his taking his seat, and in every case, until he shall resign or his seat be vacated, or until Parliament shall be dissolved, or shall expire by effluxion of time." By the Constitution Act of the colony (17 Vict. No. 41), assented to by Her Majesty by virtue of the Imperial Act (18 & 19 Vict. c. 54), it was enacted as follows:—Sect. 1. "There shall be in place of the Legislative Council now subsisting one Legislative Council and one Legislative Assembly to be severally constituted and composed in the manner hereinafter prescribed, and within the said colony of New South Wales Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the said colony in all cases whatsoever. . . . Provided that all Bills for appropriating any part of the public revenue or for imposing any new rate tax or impost subject always to the limitation contained in clause sixty-two of this Act shall originate in the Legislative Assembly of the said colony." Sect. 10 and following sections provide for the number, qualification, and election of members of the Legislative Assembly. By s. 23 every Legislative Assembly was to continue for five years from the day of the return of the writs for choosing the same and no longer, subject to be sooner prorogued or dissolved by the Governor of the colony. This period was by a Colonial Act (No. 7 of 37 Vict. 1874) reduced to three years.

The question of the construction of the Act was raised by an information in the Supreme Court of New South Wales, in equity, in the name of the appellant, alleging that the Legislative Assembly in existence at the time of the passing of the Act 53 Vict. No. 12, was no longer in existence, and charging that the provisions of the Act had ceased to be operative; and the prayer of the information was that it might be declared that there were no moneys legally available or applicable to the payment of members of the then present or any future Legislative Assembly, and that the defendant (the Auditor-General of the colony) might be restrained by injunction from countersigning any instrument authorizing any such payment. The suit came

on for hearing upon a motion for injunction turned into a motion for decree before the judge in equity of the Supreme Court; and the parties consenting that the judgment should be taken pro formâ only it was ordered that the information should be dismissed with costs. The informant appealed from this decree to the Full Court, which unanimously affirmed it.

The appellant's contention in this appeal was that according to the true construction of the Parliamentary Representatives' Allowance Act the words "every member of the Legislative Assembly now serving or hereafter to serve therein" can only refer to members of the Legislative Assembly in existence at the date of the passing of the Act, inasmuch as the words "hereafter to serve therein" can only apply to the Legislative Assembly previously mentioned, and such Legislative Assembly is defined by the words "now serving therein" to be the Legislative Assembly in existence at the date of the passing of the Act. A further contention was that if the language of the Act was ambiguous or doubtful, then the Act ought to be construed in the manner above mentioned, inasmuch as it was in substance and effect a grant of public moneys, and any doubtful point or ambiguity ought to be construed in favour of the public and against those claiming to be recipients of the public moneys. The question is, what is the meaning of "the Legislative Assembly"? In their Lordships' opinion the words "now serving therein" are not used to shew the meaning of nor should be considered as defining the Legislative Assembly to which the Act was to apply. If the Act was intended to apply to the existing Assembly, "now serving therein" are apt words for that purpose, and "hereafter to serve therein" are apt words to make it applicable to members of a future Assembly as well as to members elected to fill a vacancy that might occur in the existing one. It does not appear to their Lordships that the language of the Act is ambiguous or doubtful. They think that, according to the ordinary use of the term "Legislative Assembly," it means the Assembly created by the Constitution Act, which, though liable to be dissolved or to expire by effluxion of time, is an essential part of the constitution of the colony and must be regarded as a permanent body. If it was considered

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to be just or proper to give an allowance for expenses to the members of the existing Assembly, it may be reasonably presumed that it would be considered to be equally so to give the same allowance to the members of a future Assembly. It is very difficult to suppose that the Act was intended to apply only to the members of the existing Assembly. If this was intended it ought to have been clearly stated. Such a distinction between the existing and a future Assembly would not, their Lordships think, have been left in ambiguity. They are of opinion that s. 2 of the Act applies generally to the Legislative Assembly of the colony, and was not limited to the then existing Assembly; and they will humbly advise Her Majesty to affirm the decree of the Supreme Court and to dismiss the appeal. The appellant will pay the costs of it.

Solicitors for appellant: *Bell, Brodrick & Gray.*
Solicitor for respondent: *G. M. Light.*

[HOUSE OF LORDS.]

CLYDESDALE BANK, LIMITED, AND ANOTHER . . . . . } APPELLANTS;

AND

J. AND G. PATON . . . . . RESPONDENTS.

H. L. (Sc.) 1896 May 12.

Misrepresentation—Credit—Pleading—Mercantile Law (Scotland) Amendment Act, 1856 (19 & 20 *Vict. c.* 60), *s.* 6.

By s. 6 of the Mercantile Law (Scotland) Amendment Act, 1856, it is provided inter alia that "All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods," &c., "shall be in writing and shall be subscribed by the person . . . . making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect."

The pursuers alleged that the defenders' agent, knowing that D., R. & Co., customers of the defenders, were largely indebted to the defenders' bank and were insolvent, conceived a fraudulent design of obtaining the pursuers' acceptances in favour of D., R. & Co., in order to apply them pro tanto in reducing D., R. & Co.'s debt to the defenders' bank. That in pursuance of this fraudulent scheme, D., R. & Co. applied to the pursuers for accommodation, and referred them to the defenders' agent, who falsely assured the pursuers, First, that D., R. & Co. were in a thoroughly sound condition financially and only required temporary accommodation; secondly, that the sum due to the defenders' bank was very trifling; thirdly, that D., R. & Co. had made up the losses which they had sustained through another company; and fourthly, that no portion of the proceeds of any acceptances by the pursuers would be applied in extinction of the bank's debt or of any obligation to them. That in reliance on these assurances the pursuers granted acceptances to D., R. & Co., which were applied to the credit of D., R. & Co.'s banking account with the defenders. D., R. & Co. were sequestrated, and the pursuers, as the bills fell due, were compelled to pay them. All the representations relied on were made orally:—

Held (reversing the decision of the Second Division), that there was no cause of action, for as to the three first allegations, which undoubtedly came within the Act, the terms of s. 6 were comprehensive and imperative that no oral representations made with the intent specified in the section

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should be of any legal effect, however false and fraudulent; and secondly, assuming that the fourth representation was independent of the statute, there was no relevant allegation that the bank did not give full effect to the alleged representation of their officer.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland (1), in an action brought by J. and G. Paton, the respondents, against the Clydesdale Bank and A. Scott, the appellants.

The following statement of the facts is taken from the judgment of Lord Watson:—

"This was an action of damages brought by the respondents founded upon representations alleged to have been falsely and fraudulently made to them by the appellant Scott, who was agent in Dundee for the appellant bank, for the purpose and with the effect of inducing them to sign bills of exchange to the amount of 4000*l.* for the accommodation of the firm of Douglas, Reid & Co. It is also alleged that the main object which Scott had in view in making these representations was to enable the bank to apply the bills so procured in reduction of a large overdraft which was then due to it by the firm accommodated. It is not asserted that the directors, or any official of the bank other than Scott, were in the knowledge of his fraudulent proceedings: but it is averred that the representations made by him were within the scope of his employment as agent: and there are also averments which are said to mean that the bank did in fact receive the proceeds of the bills and apply the same in extinction of the debt due to it from Douglas, Reid & Co."

"It is admitted by the respondents that all the representations upon which they rely were made by Scott verbally. These representations were"—Condescendence, art. 5: "First, that Douglas, Reid & Co. were in a thoroughly sound condition financially, and only required temporary accommodation; second, that the sum due by them to the bank was very trifling; third, that Douglas, Reid & Co. had made up the losses which they had previously sustained through the failure of the firm of Lipman & Co. by fortunate speculations in jute; and fourth, that no portion of the proceeds of any acceptance by the

(1) 23 R. 38.

respondents would be applied in extinction of the bank's debt, or of any obligation to the bank.

"In their defences the appellants pleaded that these representations, being neither in writing nor subscribed as the Act of 1856 (1) requires, were of no effect, and could not be admitted to proof. The plea was overruled by the Lord Ordinary (Low), who allowed the parties, before answer, a proof of their respective averments. It appears to have escaped his Lordship's notice that there are statements in the Condescendence with respect to the appellant Scott's relations to one Hassberger which are simply irrelevant and scandalous, and ought to have been deleted before the record was closed. The Second Division of the Court" [the Lord Justice-Clerk and Lords Young and Trayner] "recalled the interlocutor of the Lord Ordinary, and instead of a proof before answer appointed issues to be lodged for the trial of the cause."

Their Lordships delayed the consideration of the appeal for the respondents to suggest amendments to the pleadings, to clear up the ambiguity attending the expression "The Clydesdale Bank were thus lucrati" in Condescendence, art. 11.

(1) Mercantile Law (Scotland) Amendment Act (19 & 20 Vict. c. 60). Sect. 6 is as follows: "From and after the passing of this Act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect."

The language of s. 6 of the Act of 1856 has been taken substantially from Lord Tenterden's Act of 1828 (9 Geo. 4, c. 14), s. 6 of which is as follows:—

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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Subsequently the respondents proposed to add to the Condescendence, art. 5, the following amendment: "In fact the object of procuring the pursuers to accept the bills hereinafter mentioned was to pay off with their proceeds existing debts due to the bank by Douglas, Reid & Co. on account current, contrary to the fourth assurance above set forth. Had it not been for the said assurance the pursuers would not have accepted any of the bills."

The proposed amendment to Condescendence, art. 11, is printed in italics.

Condescendence, art. 11: "Notwithstanding the foresaid statements and assurances of the said Alexander Scott, the pursuers have now ascertained, and the fact is, that their said acceptances were all placed to the credit of the said Douglas, Reid & Co.'s overdrawn account-current with the Clydesdale Bank, at the several dates when the pursuers' said acceptances respectively were obtained as aforesaid, *and were applied in extinction pro tanto of the bank's debt, contrary to the assurances given as aforesaid. If the said acceptances had not been granted and applied as aforesaid, the bank's ultimate loss would have been larger by the amount of the said bills, namely,* 4000*l. and interest thereon.* The defenders, the Clydesdale Bank, were thus lucrati to the extent of the proceeds of said acceptances. *The result was that the bank obtained and the pursuers lost the said sum of* 4000*l. and interest.*" . . . The said Douglas, Reid & Co. were creditors on the bankrupt estate of Lipman & Co. to the amount of 10,891*l.* 8*s.* 8*d.* or thereby on bills all held by the said Clydesdale Bank.

The respondents' other averments alleged (Condescendence, arts. 6, 7): That in reliance upon the said statements and assurances they on March 14, 1893, accepted a bill for 2000*l.* payable four months after date, drawn upon them for the accommodation of Douglas, Reid & Co., who discounted the same with the bank; and that they subsequently accepted other bills drawn upon them by the same firm, the bills sued upon being granted in January and April, 1894. They further alleged (Condescendence, art. 8) that Mr. Reid, of Douglas, Reid & Co., absconded on June 8, 1894: the firm was sequestrated on

September 11 of the same year, and the respondents had to pay the bills, the damages suffered being 4083*l.* 18*s.* 5*d.*

April 30, May 1, 11. *The Lord Advocate* (*A. Graham Murray, Q.C.*) and *Ure* (with them, *King*) (all of the Scottish Bar), for the appellants. The respondents have no cause of action on this record, because the grounds of the action are not in writing: s. 6 Mercantile Law (Scotland) Amendment Act, 1856; and although the representations are alleged to be false and fraudulent, yet if they are not in writing, they cannot be proved by parol. In all the cases since Lord Tenterden's Act (9 Geo. 4, c. 14) fraud has been alleged as well as representation. Lord Tenterden's Act was a rider to the Statute of Frauds (29 Char. 2, c. 3, s. 4); and s. 6 of the Mercantile Law (Scotland) Amendment Act was introduced into Scottish law for the purpose of assimilating the laws of England and Scotland. [They cited *Pasley* v. *Freeman* (1789) (1); *Haslock* v. *Fergusson* (2); *Tatton* v. *Wade* (3); *Devaux* v. *Steinkeller* (4); *Lyde* v. *Barnard* (5), and *Swann* v. *Phillips.* (6)]

Balfour, Q.C. (of the Scottish Bar), and *Sir Robert Reid, Q.C.* (with them *Robertson, Q.C.*), for the respondents. The trial ought to be allowed to take place. The representations in their nature and character come under s. 6 of the statute in question. But they were part of a fraudulent scheme with the ulterior purpose of obtaining credit from the respondents: that takes the case out of the statute. If one part of the scheme can be proved without writing, then the Court will not stop the case because another part of the scheme requires such proof: see query in *Haslock* v. *Fergusson.* (7) Douglas, Reid & Co. were only used as a means of getting the money into the hands of the bank. The fourth representation was either a promise or a fraudulent statement on the part of the bank, and therefore was outside the statute. The Condescendence, arts. 7, 8 and 11, shews the appellants were lucrati: that is, the money was paid into the bank for the bank's benefit. If the appellants had been suing for the amount of these bills, the fraud could have

(1) 3 T. R. 51.
(2) 7 A. & E. 86; 2 N. & P. 269.
(3) 18 C. B. at p. 381.
(4) 8 Sc. 202.
(5) 1 M. & W. 101, at p. 105.
(6) 8 A. & E. 457.
(7) 7 A. & E. 86, 89.

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been proved by parol: Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 100: and by s. 30 the burden of proof is placed on the holder.

Ure, in reply.

LORD HALSBURY L.C. informed the respondents that as there was an ambiguity as to the allegation that the bank were "lucrati," and the respondents had no distinct assertion as to what became of the produce of the bills; they might hand in amendments to the Condescendence in respect to the fourth representation. Subsequently the amendments mentioned above were given in.

The Lord Advocate, for the appellants. The additions to the Condescendence are only word-painting. To support their charge the respondents were bound to plead that the account of Douglas, Reid & Co. was closed: or that no more cheques were allowed to be drawn: or that no benefit was allowed to be obtained from the money. It is quite consistent with these additional amendments that Douglas, Reid & Co. were permitted to draw against the produce of the bills: and, indeed, that is the fact.

Balfour, Q.C., for the respondents. It is well alleged that the acceptances were applied in extinction pro tanto of the bank's debt: and if they had not been so applied the bank's ultimate loss would have been larger by the amount of these bills. That is, the bank are gainers and the respondents are losers to the amount of these bills.

[LORD HERSCHELL. The point was plainly put during the last hearing whether the bank did or did not give credit to Douglas, Reid & Co. after these bills were paid in: and now you have not stated that they were not permitted to draw against the bills.]

LORD HALSBURY L.C. My Lords, it appears to me that whatever doubt might have been entertained upon the original argument of this case, no doubt can now be entertained as regards that which appeared at first sight perhaps to be an insufficient and inadequate statement of the causes of action, but, which might, possibly, upon a certain construction, shew

that there had been a cause of action sufficiently set forth upon the pleadings on the record. No doubt can now be entertained that the pleader, (with the facts before him and with a knowledge of the discussion which has taken place in this House, pointing out that, taking the most favourable view for the pleader, the allegations were ambiguous: although time has been allowed for the purpose of amending that ambiguity) has done all that he possibly could do, consistently with being able to prove the facts at the trial, to avoid stating in express terms what, if it were true, he could have stated, namely, the non-performance of the promise by the bank to give additional credit to the firm which it was proposed to assist.

The matter seems to me to be very clear: and, to use the language of English pleading, facts are set out from which it would appear that there has been (I will assume in favour of that view) a combination to induce the respondents to advance a further sum of money under circumstances in which it was to the advantage of the bank and to the advantage of those who persuaded the respondents to allow the debtor, who was in some difficulties which might lead to his sudden bankruptcy, to continue carrying on his business. If the allegations with which I am about to deal had been to the effect that in pursuance of that combination the bills had been signed; and that the bank by that combination had managed to get their own debt paid—in pursuance, as I say, of that combination—and that the person who signed the bills had been induced to sign them by the false representation that it was intended to enable the debtor to carry on his business so as perhaps to recover himself: but that in lieu of that the bank had appropriated the whole of the new advances to pay off their own past debt, I am of opinion that there would have been a good cause of action shewn upon the face of this record. But after the discussion which has taken place: and after what has been pointed out as to the ambiguous language used in the pleadings; it is manifest to me that no such thing can be averred, and it is perfectly consistent with every allegation on this record that the bank did what they were expected to do, and that on receiving these new advances they did apply them to the credit of the debtor.

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Although in a certain sense it may be that at the end the bank was less a loser than it would otherwise have been by reason of this advance, yet the only thing which makes it properly a cause of action is omitted from this Condescendence.

The language of an English pleader would be that, whatever was the contract intended to be entered into and entered into in fact, there was no breach upon the face of this record properly assigned. There is nothing which shews that the thing that was to be done by the bank was not done and done perfectly bonâ fide, and with the intention of helping the person who was in difficulties as he was helped, and that he was helped accordingly. That, as I have said, might have been a slip on the part of the pleader originally, and I myself should have been reluctant to have given judgment against the pursuer in this case upon that view, if it had rested upon what might be only the ambiguous language of pleading. But after more than a week's delay, and seeing the amendments which are now proposed, it seems to me that, with great astuteness and skill in the use of language, the pleader has repeated exactly the same thing in different words, and has expressly avoided doing that which would, as I say, have set out a complete cause of action. Under these circumstances it appears to me that all your Lordships can do is to allow the appeal and remit the action to the Court below, to assoilzie the defenders, and find the respondents liable in expenses.

The only difficulty I have had has been in looking through the different pleadings and seeing what has been sufficiently averred; and as we have from time to time made international reflections as to our different systems of pleading, I cannot help saying, and I say it with regret, that had this occurred in an English action, and had a statement of claim been the subject of controversy instead of these Scottish pleadings, I believe it would have been impossible for your Lordships to disentangle the allegations made and to pronounce the judgment we are now proposing to pronounce, and to prevent the possibility of a considerable amount of costs being wantonly thrown away. By the precision of the Scottish pleading there is still a necessity to set out the real cause of action, which is capable of definite

and precise statement, which I regret to say is no longer the case in English pleadings. I therefore speak with some degree of envy when I say that, at all events, the Scottish jurisprudence has preserved something like a system in which a definite and precise allegation of the cause of action is required to be set out before a litigant is allowed to incur considerable expense in proving what may after all turn out to be no cause of action at all.

For these reasons I move your Lordships that the judgment be reversed.

LORD WATSON. The main question involved in this appeal is new to the law of Scotland, although it arises upon the terms of a statute which was passed in 1856. Sect. 6 of the Mercantile Law (Scotland) Amendment Act of that year enacts: [His Lordship read the section given ante, p. 383.] These enactments are in substance the same as the provisions of s. 6 of 9 Geo. 4, c. 14, commonly known as Lord Tenterden's Act, which applies to England and Ireland. There is this difference of expression between the two clauses—that in the earlier statute it is declared, not that the representations and assurances shall be of no effect, but that no action shall be maintainable upon them when they are not contained in a writing duly subscribed.

[His Lordship having stated the facts given above, continued:—]

All the learned judges in the Courts below were of opinion that the circumstances of the case, as disclosed in the Condescendence, took these representations out of the statute of 1856. The Lord Justice-Clerk held it to be sufficient for that purpose that the representations were made in pursuance of a fraudulent scheme by means of which the bills were obtained, on the assurances of its agent, for the purposes of the bank. The same view was more clearly indicated by Lords Young and Trayner, who were of opinion with the Lord Ordinary that the representations would have been within the statute if they had been made for the sole purpose of inducing the respondents to accept the bills, but that they were excluded from its operation

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because they were made for an ulterior purpose which is not mentioned in the statute, namely, in order that the bank might be enabled to obtain payment of its claims against Douglas, Reid & Co.

The fourth representation does not appear to me to involve the construction of the statute. It differs from those which precede it in this respect, that it does not contain any assurance relating to Douglas, Reid & Co., or to their credit, ability, or trade. In my opinion, it does not possess the character of a representation to which the statute applies. In the view of the law which was adopted by the Courts below, the distinction between the fourth and the first three of the representations libelled on was immaterial.

The provisions of s. 6 are expressed in terms as comprehensive as they are imperative. They enact that no verbal representations, being of the character and made for the purpose and with the intent specified in the clause, shall be of any legal effect, as giving a remedy to the person who may be misled by them to his detriment. They in substance provide that no person to whom such verbal representations are made for such a purpose shall have any right to rely upon them, and that if he does choose to act upon them he must bear the consequences of his own credulity. It is also, in my opinion, obvious that these provisions were not intended to meet the case of truthful and honest representations, and that they necessarily include all representations of the character and made with the purpose specified, however false and however fraudulent.

In the present case it has hardly been controverted, and it does not appear to me to admit of serious dispute, that the first three of the representations upon which the action is laid answer precisely both in character and in their immediate object to the description contained in s. 6. But it has been argued (and the argument found favour with the learned judges of the Court of Session) that these three representations are not within the incidence of s. 6, because they are alleged to have been made, not merely with the immediate purpose of inducing the respondents to sign accommodation bills, but with the further and fraudulent purpose of enabling the

bank to appropriate the bills, when granted, to the payment of its debt. I do not think that the argument has any solid foundation in fact. The main, if not the only, cause of action disclosed by the Condescendence is the fraudulent procuring of the respondents' acceptance of the bills in question by means of these representations. But I am of opinion that, even if it be warranted by the facts, the argument is without foundation in law. It seeks to limit the generality of the enactments of s. 6 by introducing a proviso to the effect that they shall not apply in cases where the person making the representations has in view some ulterior and illegitimate purpose beyond inducing the person to whom they are made to give credit or money to a third party. There is no warrant for such a limitation to be found in the words of the clause, which, in my opinion, declare explicitly that any verbal representation to which they apply shall be absolutely inefficacious, no matter what may be the further and fraudulent design of the person who made it.

It was maintained for the respondents that the competency of proving these representations by parol has been established by s. 100 of the Bills of Exchange Act, 1882, which provides that—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence." It may well be doubted whether the present action does raise any question of liability upon the respondents' accommodation bills; but it is an obvious answer to the argument that, in the present and similar cases, such verbal representations have since the Act of 1856 ceased to be relevant facts.

It is possible that the fourth representation might be founded on, either as being a fraudulent inducement to sign bills for the accommodation of Douglas, Reid & Co., or as constituting a promise or agreement binding the bank to abstain from imputing any part of the proceeds of these bills towards payment of its debt. But in neither of these aspects do I find any relevant allegation in the Condescendence. It is not averred that the bank has failed to fulfil the representation said to have been

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made by its agent. The only averment upon this point, which occurs in the 11th article of the Condescendence, is that the respondents' acceptances "were all placed to the credit of the said Douglas, Reid & Co.'s overdrawn account-current with the Clydesdale Bank, at the several dates when the pursuers said acceptances were obtained as aforesaid. The defenders, the Clydesdale Bank, were thus lucrati to the extent of the said acceptances." These allegations are quite consistent with the possibility that the whole of the sums so credited were drawn out by Douglas, Reid & Co., and by them applied to their own purposes, and are therefore irrelevant.

Your Lordships delayed the consideration of this appeal in order that the respondents might have an opportunity of submitting any amendment shewing that the bank had applied the proceeds of these acceptances in reduction of the balance due to it by Douglas, Reid & Co. The respondents have proposed to add two new averments, the first being that the acceptances were "applied in extinction pro tanto of the bank's debt," and the second that, "If the said acceptances had not been granted and applied as aforesaid the bank's ultimate loss would have been larger by the amount of the said bills, namely, £4000 and interest thereon." I see no reason to doubt that these amendments have been very properly framed with a strict regard to the limits of truth; but, in my opinion, they come far short of relevancy. So far from negativing, they appear to me rather to suggest that the appellant bank not only allowed to Douglas, Reid & Co. the free use of the proceeds of the respondents' acceptances, but made new advances to that firm out of its own funds.

I have only to observe further that, if the fourth representation were relied on as a promise which the bank had failed to fulfil, the respondents would have no title to raise the question. The only person having a title to complain of a breach of that promise would, in that case, be the trustee in Douglas, Reid & Co.'s sequestration.

For these reasons I am of opinion that the interlocutors appealed from must be reversed with costs, and that the action ought to be remitted to the Second Division of the Court

of Session, with directions to assoilzie the appellants from its conclusions, with expenses in both Courts below.

My noble and learned friend Lord Morris, who is judicially engaged elsewhere to-day, has requested me to state that he concurs in the opinion I have just read.

LORD HERSCHELL. My Lords, the action is founded upon four matters, the statement of which is contained in the 5th article of the Condescendence. It cannot be doubted that the first three complaints referred to statements made, and are founded upon statements made, by the appellants' agent with reference to the "character, conduct, credit, ability, trade, or dealings" of Douglas, Reid & Co. Apart from the provisions of the Mercantile Law Amendment Act of 1856, no doubt can be entertained that the Condescendence discloses relevant facts establishing a cause of action against the appellants. The objection taken on their behalf to the relevancy of the Condescendence is founded upon the provisions of that enactment. The respondents seek to avoid the operation of the statute so far as they are concerned in the present case, and have succeeded in obtaining judgment in their favour on the ground that the representations made were part of a scheme fraudulently devised by the appellants and Douglas, Reid & Co. for the purpose of benefiting the bank at the expense of the respondents. In my opinion the operation of the statute cannot be so avoided. Assuming that the respondents could establish that the representations were made for the purpose of giving effect to such a fraudulent scheme, I am of opinion that the enactment positively forbids any effect being given to those representations. It is impossible to conceive of an enactment in more general or unambiguous terms: "all representations and assurances" of the nature described, unless in writing, are to have no effect. The action of the respondents, if it is to be maintained, requires as its foundation that effect should be given to those representations which the statute has said shall have no effect. I do not see how it is open to question that the representations were of a kind within the words of the statute, because the statute applies to all such representations made or granted to the effect or "for

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the purpose of enabling such person to obtain credit, money, goods," &c. Now the very framework of the respondents' case is that the representations had the effect of rendering them liable upon certain bills of exchange which resulted in money being paid to the bank for the accommodation of Douglas, Reid & Co. How, then, it can be said that they were not made or granted to the effect of enabling those persons to obtain credit or money, it is difficult to see. And if the statute in terms applies, how is it possible to avoid its operation by proving that the design of the bank and of Douglas, Reid & Co. in making the representations and so procuring the credit was an ulterior benefit to the bank?

The respondents also maintain that the hundredth section of the Bills of Exchange Act of 1882 dispenses in such a case as this, inasmuch as obligations on bills of exchange come in question, with the necessity of the writing which is required by the Mercantile Law Amendment Act. I think it is an argument which it is difficult to treat seriously. It is impossible to conceive that the hundredth section of the Bills of Exchange Act can have repealed pro tanto the Mercantile Law Amendment Act whenever obligations upon bills of exchange have been obtained by representations as to conduct, credit, or character.

That disposes of the case so far as regards the first three of the allegations contained in the Condescendence. The fourth allegation is quite independent of the statute: it is that the appellants represented "that no portion of the proceeds of any acceptance by the pursuers would be applied in extinction of the bank's debt." I think that allegation is only relevant if it can be maintained as a representation made by the bank to the respondents upon which they acted, being a false and fraudulent representation. If it is a promise only it would not be relevant, because the respondents would have no title to sue in respect of its breach. But no doubt that which is in form a promise may be in another aspect a representation; and I think that the fourth averment of the 5th article of the Condescendence may be treated as relating to a representation by the bank which is alleged to be false and fraudulent.

My Lords, taking it to be so, I do not think that when you take the whole of the Condescendence together, it is shewn that the bank did make a false and fraudulent representation of an intention which they never meant to carry out, because that is, of course, what it must amount to. So far as appears, the bank, if they indicated an intention that it should not be used in extinction of the debt, carried out that intention. There is no allegation that they did not give full effect to that which they alleged to be the intention. It was open, perhaps, to some argument, as the case stood, whether the allegations in the subsequent articles of the Condescendence had not been, from want of care, so framed as to be consistent with that intention either being carried out or not being carried out. Accordingly, an opportunity was given to the respondents to suggest any amendment which they would desire to make with a view of clearing up the doubt which might be said to exist. Having had ample opportunity of considering what averments they could add, they have failed to suggest to your Lordships any averments as capable of proof by them which would shew that the bank did not intend that the money should not be applied in extinction of their debt, looking at the substance of the matter, and not at the form, and that the alleged intention was not given effect to.

For these reasons I think that the action altogether fails, and I entirely concur in the judgment which has been proposed.

LORD DAVEY. I also concur in the judgment which your Lordships propose to give in this appeal, and also in the reasons which have been assigned for that judgment.

The 5th article of the Condescendence which contains the representations alleged to have been made by or on behalf of the bank commences with the averment that those representations were made on the occasion of Douglas, Reid & Co. requiring temporary accommodation. It then avers that Mr. Paton, one of the pursuers, saw Mr. Scott, the manager of the bank, who made the four representations relied upon (1); those have been

(1) Ante, p. 382.

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read, and I will not repeat them. We have it, then, that those representations were made upon the occasion of Douglas, Reid & Co. requiring temporary accommodation from the pursuers' firm, and one of the pursuers accordingly seeing the manager of the bank.

Now, it cannot be disputed, I think, that the three first of these representations contained in the 5th article of the Condescendence are "representations and assurances as to the character, conduct, credit, ability, trade, or dealings" of the firm of Douglas, Reid & Co.; and the Lord Ordinary holds, and to my mind it is obvious, that they were made for the purpose of enabling the firm of Douglas, Reid & Co. to obtain credit or money from the pursuers. If so, they would seem primâ facie to fall within the 6th section of the Mercantile Law (Scotland) Amendment Act, 1856.

But it is said that, although they were made for that purpose, there was an ulterior purpose or motive for obtaining the credit for Douglas, Reid & Co. from the pursuers which was of a fraudulent character and takes the case out of the statute. Now, my Lords, I entirely concur in the observation that has been made, that if it was intended to except representations made with a fraudulent motive, or representations of a fraudulent character, from that statute, the exception to that effect would have been introduced into the statute. Indeed, it appears to me that if you introduce such an exception into the Scottish statute, or into the English statute which has been referred to and is known by the name of Lord Tenterden's Act, you will to a large extent—I should say, almost entirely—nullify the beneficial operation of that statute: because what are the cases in which the statute comes into play? The class of representation in which the question which was intended to be dealt with by those two statutes occurs are usually and for the most part fraudulent representations, or it is sufficient to say that they may be; and if you excluded representations of a fraudulent character or representations made fraudulently or with a fraudulent purpose from those statutes, you would, in the majority of cases, fritter away the beneficial provisions of the statutes.

Therefore I think it is no answer to the plea of the defenders

that the case falls within the words of the 6th section of the Mercantile Law (Scotland) Amendment Act, to reply that these representations were made with a fraudulent motive or were of a fraudulent character; consequently I am of opinion that, having regard to the language of the 6th section of the Act, the present action is not maintainable upon these three first averments or representations by the defenders.

With regard to the fourth representation, I will assume that it may be read as a representation of a fact. I have myself considerable doubt whether in the form in which it is alleged, being an allegation of an intention and not of a fact, it is not giving too benevolent a construction to the pleadings so to read it; but for the present purpose I will assume that it is an allegation of a fact, and that it is a representation of the purpose for which the acceptances were required from the pursuers. Treating it so, it would not, I agree, be within the 6th section of the Mercantile Law (Scotland) Amendment Act; it would be outside that statute. But then, in order to make it actionable, you would require allegations, not only that that representation was made fraudulently, which you have, but also that it was acted upon, and that the defenders suffered damage by such acting. Now, my Lords, it was agreed on all hands by your Lordships that the allegation in the Condescendence as it stands (the 11th article of the condescendence) was wholly insufficient to allege any such damage, because it merely alleged that the 4000*l.* were paid to the overdrawn account of Douglas, Reid & Co. with the Clydesdale Bank, and that "the Clydesdale Bank were thus lucrati to the extent of the proceeds of the said acceptances"; leaving it perfectly open and perfectly uncertain whether the Clydesdale Bank, although they immediately got the benefit of the 4000*l.*, did not afterwards allow Douglas, Reid & Co. to draw to that extent for the purposes of their business, so that the 4000*l.* really and in substance would go in the manner in which it was averred it was intended to go. Your Lordships have given the respondents an opportunity of amending their condescendence in case what I conceive to be the obvious meaning of it was only a slip. Possibly, if the amendment which they propose had been in the

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Condescendence in the first instance, it might have been considered sufficient; but I am bound to say that, after the respondents had heard what had been said by your Lordships, and had known exactly where the shoe pinched and where the averment was insufficient—if they had been able to aver that Messrs. Douglas, Reid & Co. were not allowed to draw 4000*l.* after the bills had been paid into the bank, for the purposes of their business, I cannot conceive that the respondents would not have said so. Instead of that, they propose to insert an allegation which is to my mind perfectly consistent with the fact that Douglas, Reid & Co. were allowed to draw and did in fact draw out 4000*l.* after having placed it to their credit with the bank; because what they say is, that "the bank's ultimate loss would have been larger by the amount of the said bills, namely 4000*l.*, and interest thereon." My Lords, that is perfectly susceptible of the construction—and I am bound to say I think it is the true construction—that it means the ultimate loss of the bank, having regard to further advances made against the 4000*l.* No doubt if they allowed Douglas, Reid & Co. to draw out the 4000*l.*, there would have been 4000*l.* added to Douglas, Reid & Co.'s debt if you did not give the bank the benefit of the 4000*l.* paid to the credit of the account. It is sufficient to say that in my opinion the proposed amendment fails to meet the requirements which it was pointed out to the respondents by your Lordships should be met in any amendment which they proposed to make of their pleadings.

Under these circumstances, I think it would be a waste of expense to allow the defenders to go to trial upon the fourth representation contained in the 5th article of the Condescendence.

THE LORD CHANCELLOR. My Lords, before putting the question, I should wish to say that my noble and learned friend Lord Macnaghten, as well as Lord Morris, concur in the judgment which your Lordships are delivering. And for myself I wish to add that, if I only dealt with the fourth allegation in the Condescendence in the opinion which I have just expressed to your Lordships, it was because I really, with all respect to those learned persons who have looked into the

matter, thought that the question with regard to the statute was too plain for argument. But, as my silence upon that question might be supposed to indicate some difference of opinion, I wish to say that I entirely concur in the construction of the statute which has been placed upon it by my noble and learned friends.

Interlocutors appealed from reversed: Further ordered, that the cause be remitted to the Court of Session, with directions to assoilzie the appellants from the conclusions of the action and to find the respondents liable in expenses: Further ordered, that the respondents pay to the appellants the costs incurred in respect of the appeal.

Lords' Journals, May 12, 1896.

Agents for appellants: *Murray, Hutchins, Stirling & Murray, for Ronald & Ritchie, S.S.C., Edinburgh.*

Agents for respondents: *William Robertson & Co., for J. Smith Clark, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1896 May 15.

MACKENZIE AND OTHERS . . . . . APPELLANTS;

AND

THE DUKE OF DEVONSHIRE AND OTHERS . . . . . RESPONDENTS.

Succession—"Heirs female"—Trust Disposition.

A truster in the narrative of his trust disposition stated that, "in order to make and secure additional provisions" for his second son "and the other heirs of entail succeeding to him in" the lands and estate of C., to "enable them to support the dignity and title of Earl of C.," he thereupon conveyed to trustees certain securities. In the dispositive portion of the deed it was declared, "that these presents in favour of my said trustees are granted in trust for the uses ends and purposes . . . . and under the conditions provisions and declarations after written." Then, fourthly, he directed his trustees after his death to pay the free proceeds of the trust funds to his second son and the heirs male of his body; whom failing, to certain substitutes; "whom failing, to the heirs female of the body" of his second son. The second son succeeded to the estate, and died, leaving issue only two daughters, of whom the eldest succeeded to the estate, and was declared by Royal Letters Patent to succeed her father in the title and estate of C.:—

Held (reversing the decision of the Second Division), that the daughters divided the income, because "heirs female" meant in Scottish law heirs portioners who took as a class; and that the narrative could not control the directions of the deed.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland (1), on a special case, in which Lady Constance Mackenzie and her curators, the appellants, were third parties; Sibell Lilian, Countess of Cromartie, and her curators, the respondents, were second parties; and the Duke of Devonshire and others, trustees and respondents, were first parties.

The question was whether the free income of certain trust funds fell to be paid wholly to the Countess of Cromartie, or was to be divided equally between her and her younger sister, Lady Constance Mackenzie.

In 1746 George Mackenzie, Earl of Cromarty or Cromartie,

(1) 22 R. 839.

Viscount of Tarbat, and Lord Macleod and Castlehaven, was attainted of high treason, and the Earldom of Cromartie and minor honours, as well as the family estates, were forfeited. George, Earl of Cromartie died in 1766.

In 1784 the estates, but not the honours, were restored to his eldest son, John Mackenzie, commonly called Lord Macleod.

In 1786 Lord Macleod executed a deed of entail, whereby he entailed the whole Cromartie estates on himself and the heirs male of his body; whom failing, to the heirs female of his body and a number of substitutes, declaring that the eldest heir female and the descendants of her body should exclude heirs portioners and succeed without division so oft as the descent was to females. Under that deed of entail the late Duchess of Sutherland succeeded in 1849. Her Grace was then the wife of the Marquess of Stafford, who on the death of his father on February 28, 1861, became Duke of Sutherland.

In 1861, by Royal Letters Patent, the Queen created the then Duchess of Sutherland Countess of Cromartie, with remainder to Francis Sutherland Leveson-Gower, her second surviving son, and the heirs male of his body; and in default of such issue to each of the other younger sons by the Duchess's present or any future husband, and the heirs male of the body and respective bodies of such sons severally and successively one after another; and in default of such issue to Francis Sutherland Leveson-Gower and the heirs of his body lawfully begotten and to be begotten.

In connection with this restoration of the family honours certain provisions were made for the endowment of the Earldom of Cromartie; and on August 6, 1861 (24 & 25 Vict. c. iv.), the Duke and Duchess of Sutherland obtained a private Act of Parliament disentailing and re-entailing on the Duchess and her second son, Lord Francis Sutherland Leveson-Gower and the heirs male of his body; whom failing, any son or sons to be thereafter born of the Duchess in the order of seniority, and the heirs male of his or their bodies; whom failing, the heirs female of the body of Lord Francis; whom failing, &c., the eldest heir female and the descendants of her body, always excluding heirs portioners, and succeeding, without division,

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throughout the whole succession of heirs whatsoever, as well as heirs of provision, so oft as the same should descend to females.

In 1878 the Cromartie estates were again disentailed and re-entailed on the then Duchess; whom failing, on Lord Francis Sutherland Leveson-Gower, therein designed Francis Viscount Tarbat, her second surviving son, and the heirs of his body; whom failing, to other heirs of entail therein mentioned, the eldest heir female and the descendants of her body, always excluding heirs portioners, and succeeding without division throughout the whole course of succession of heirs whatsoever, as well as heirs of provision.

On July 23, 1862, the Duke of Sutherland executed the trust deed in question. It commenced thus: I, &c., "in order to make and secure additional provision for Francis Sutherland Leveson-Gower, commonly called Lord Macleod, my second surviving son, and the other heirs of entail succeeding to him in the lands and estate of Cromartie, such heirs being descendants of the marriage between me and Anne Hay Mackenzie, Duchess of Sutherland and Countess of Cromartie, my wife, to enable them to support the dignity and title of Earl of Cromartie," therefore I, &c. He then conveyed certain bonds, policies of insurance, and other securities, to trustees, the above-named first parties.

The deed then provided, inter alia: "Moreover, in farther fulfilment of my intention to make additional provision for the said Francis, &c., Lord Macleod, to enable him to support the dignity and title of Earl of Cromartie on his becoming Earl of Cromartie," the trustee bound himself during his life to pay him or any other of his sons succeeding to the dignity 1500*l.* a year. Then: "But declaring always that these presents in favour of my said trustees are granted in trust for the uses, ends, and purposes, with the powers and under the conditions, provisions, and declarations after written." (3.) "That my trustees shall during my lifetime pay the free annual proceeds of the said trust funds to me." (4.) "That my said trustees shall, on my death, if the said Francis Sutherland Leveson-Gower, commonly called Lord Macleod, be then in minority,

out of the free proceeds of the trust funds apply such amount as shall be requisite for his maintenance and education, and thereafter accumulate any balance which may remain, and invest the same," &c.; "and upon the said Francis Sutherland Leveson-Gower, commonly called Lord Macleod, attaining the age of twenty-one years complete, my said trustees shall then pay the free proceeds of the said trust funds, including the accumulated sums aforesaid, to him and the heirs male of his body; whom failing, to any son or sons to be hereafter born of my present marriage in the order of seniority, and the heirs male of his or their bodies; whom failing, to the heirs female of the body of the said Francis Sutherland Leveson-Gower, commonly called Lord Macleod." [The above was the clause upon which the question arose. The clause continued:—] "Whom failing, to the heirs female of the body of any son or sons to be hereafter born of my present marriage in the order of seniority of such sons; whom failing, to Lady Florence Sutherland Leveson-Gower, my daughter, and the heirs whatsoever of her body; whom failing, to any daughter or daughters to be hereafter born of my present marriage, in the order of seniority, and the heirs whatsoever of her or their bodies; whom all failing, then the said trustees shall dispone, convey, assign, and give over to and in favour of the said Cromartie Sutherland Leveson-Gower, commonly called Marquis of Stafford," or the heir for the time being in possession of the dignity of Earl of Sutherland, &c.

The funds so placed in trust amounted to about 130,000*l.*

On September 5, 1876, Francis, Viscount Tarbat, assigned certain policies of insurance to the trustees under his father's deed of July, 1862, and for the same purposes. The question affected both sums in the same way.

The Duchess of Sutherland, Countess of Cromartie, died on November 25, 1888, and was succeeded in the Earldom of Cromartie by her son Francis, Viscount Tarbat. He also succeeded his mother in the Cromartie estate in terms of the entail of 1878.

The Duke of Sutherland died on September 22, 1892, whereupon the income of the trust funds was paid to Francis, Earl

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of Cromartie, until his death on November 24, 1893. Earl Cromartie, who had no younger brother, left no male issue, but was survived by two daughters, namely, Lady Sibell Lilian Mackenzie, one of the respondents, and Lady Constance Mackenzie, one of the appellants. The former, in terms of the entail of 1878, succeeded her father in the Cromartie estate; and, with the consent of her guardians, presented a petition to the Queen setting forth the creation by Royal Letters Patent in 1861 of the Earldom of Cromartie and minor honours; that she had succeeded to her father as sole heiress of entail in the estate of Cromartie; but that doubts had been expressed as to whether the said title and dignities had devolved in her favour or remained in abeyance; and prayed Her Majesty to declare that the said dignities and titles were vested in the petitioner; or otherwise, and in the event of their being in abeyance, to determine such abeyance in favour of the petitioner.

By Royal Letters Patent, February 25, 1895, her Majesty declared that Lady Sibell Lilian Mackenzie is, and shall be, Countess of Cromartie, &c., and granted and confirmed the said Earldom to her and to the heirs of her body in as full a manner as Francis, Earl of Cromartie, or his mother Duchess of Sutherland held the same.

The question then arose as to the administration of the income of the trust funds.

The Second Division, on July 2, 1895, held that Sibell Lilian, Countess of Cromartie, was entitled to the whole income of both funds. The Court also found the parties to the special case entitled to their expenses out of the trust estate held by the parties of the first part as the same might be taxed by the auditor. Against this interlocutor, except so far as regards costs, the appellants appealed.

May 15. *Balfour, Q.C.*, and *David Dundas* (with them *John Craigie*), for the appellants. The question is, if "heirs female" take as heirs portioners, and in this case divide the income: that is admitted to be the ordinary rule; but the learned judges of the Court of Session decided that the narrative part of the deed provided differently. But "heirs female" are words of art, and

cannot be cut down by the expression of intention in the earlier part of the deed. In very possible events there might have been a divergence of the estates and the Earldom; for instance, if the Duchess had had a younger son, then the Earldom would have gone to him before the female heirs of Francis, but the estates would have gone to the heirs of Francis. The most general rule is for an equal division. There is no doubt there is an exception in the succession to a Scottish peerage; but, quoad ultra, the rule that "heirs female" take as a class remains.

The Lord Advocate (*A. Graham Murray, Q.C.*) (with him *J. R. N. Macphail*), for the respondents, the Countess of Cromartie and others. The income is not to be divided. The term "heirs female" as regards succession to heritage must be taken to mean "heirs portioners"; but there has been no case where the rule has been applied to succession to moveables. If the peerage went into abeyance, as in England, there might be a question; but this is the case of a Scottish peerage going according to Scottish law to the eldest daughter.

[LORD HERSCHELL. This is a new creation.

LORD WATSON. If it were the restoration of a Scottish peerage, the eldest heir portioner would alone be able to sit and vote.]

R. L. Blackburn, for the respondents, the Duke of Devonshire and others trustees, agreed to the expenses coming out of the trust funds.

[All the counsel were of the Scottish Bar.]

LORD HALSBURY L.C. It appears to me that this case is susceptible of a very short solution. I simply look at the deed itself and I find that the provisions for the beneficiaries intended by this deed are satisfied by the persons claiming now as heirs female. I really have great difficulty in saying more than that, because if the language of the instrument itself is sufficiently clear as to the beneficiaries pointed to, as I think it is, and if the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those

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words, and the purposes of the trust so set forth, can be in any way controlled, qualified, or modified by the initial statement of what the motive of the author of the deed was. It would to my mind be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made. I should say that, even if there were some contradiction between what was done and the supposed purpose. But here it is very obvious to remark that the purpose or the motive which the maker of the deed prescribes to himself is to some extent satisfied by what he does, and I can only say, speaking with the utmost respect of the learned judges who expressed a different view, that I am unable to comprehend how that purpose could alter the natural and ordinary effect of the words used in the instrument.

I move your Lordships that the judgment of the Court below be reversed: and that this appeal be allowed.

LORD WATSON. I have come without any difficulty to the same conclusion.

These ladies are heirs female, and they are also heirs portioners. Heirs portioners who are heirs female take, according to the law of Scotland, as a class. The destination or gift to them contained in this trust deed, if it were a destination or a gift of land, would be effectual to give them a pro indiviso right in the land, each taking an equal share; and I have heard nothing suggested to the effect that when there is a gift of moveable property to the same class in plain and unambiguous terms it should have a different effect. There can be no reason for its receiving a different effect in such a case, unless it be upon a principle which is unknown to the law of Scotland—that in dealing with money you require to use

language more precise than when you are dealing with a land right.

The ground upon which the judgment of the Court below proceeds really comes to this, that to read the words in the sense in which I think they ought to be read would be at variance with the main purpose of the deed as declared in the narrative of it. My Lords, I think that is carrying the principle of construction by intention too far. I can quite understand that where words are capable of being modified or qualified in the context in which they occur it may be legitimate to ascertain how far one reading or another would best promote the intention of the maker of the deed; but I fail to see that the words at the commencement of the deed which have been referred to as imperative come to anything more than a statement that the deed was made because the truster entertained benevolent intentions towards certain persons who are included in the deed, and who are benefited by it. But it does not bring about any contradiction between his intention and the words of the deed, if you find there that besides the persons whom he intended to benefit, and whom he has benefited, some benefit is given to others. I think that it is a very dangerous canon of construction to admit what may be a partial statement of intention, quite consistent with other objects, to control the whole of the other language of the deed with the effect of striking out beneficiaries whom the truster may have intended to benefit. The narrative words come to no more than this: "My intention is to do" so and so, and you may add this, "and I have accomplished that purpose by the provisions which follow." In such a case the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction.

LORD HERSCHELL. I am of the same opinion.

LORD SHAND. If the truster in this case had contemplated the case that has actually occurred, it may very well be supposed he would have made a provision giving effect to the view which the Court below has taken. While saying at the outset of the

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deed that his purpose was to enable beneficiaries "to support the dignity and title of the Earl of Cromartie," he might have thought it would better secure that purpose where heirs portioners did succeed as females that the eldest heir portioner should have the income. I can only say that if he had any such intention it is not expressed. The deed in its operative provision contains very distinct directions to the trustees. The trustees are expressly directed to give the income to the heirs female, and it is conceded by the learned judges in their opinions that the ordinary meaning of those words is that there shall be a distribution of the fund amongst all the heirs female. I fail to see any room for the suggestion that there is ambiguity in that provision. Although it might appear that there was a failure to fulfil the intention of the truster, I should still give effect to the operative words of the deed, because his directions are given in distinct terms. But, as has been observed by the Lord Chancellor and by my noble and learned friend who has already spoken (Lord Watson), he does not fail to carry out that intention, for in any view that may be taken of the deed the eldest heir female succeeding to the estate of Cromartie does get material benefits, although she has no right to the whole income.

Under these circumstances I am of opinion that the decision of the Court below in this case must be reversed.

LORD DAVEY. I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention. Now in this case Lord Trayner says in his judgment that "if these words are to be construed literally then the destination must be read as conveying the proceeds of the trust funds to the second and third parties equally who are the heirs female of Lord Tarbat." In that I agree, and that being so I concur in the judgment proposed.

Ordered, that the interlocutor of July 2, 1895, *so far as complained of, be reversed: Further ordered, that the whole free income of the*

funds held in trust by the respondents, the parties of the first part, is payable in equal shares to and between the respondent, Sibell Lilian, Countess of Cromartie, the party of the second part, and the appellant, the Right Honourable Lady Constance Mackenzie, the party of the third part: Further ordered, that the costs of all parties to the appeal be paid out of the trust funds held by the respondents, the trustees.

Lords' Journals, May 15, 1896.

Agents for appellants: *Robins, Hay, Waters & Lucas, for J. C. Couper, W.S., Edinburgh.*

Agents for respondents, Countess of Cromartie and others: *Gadsden & Treherne, for Mackenzie & Black, W.S., Edinburgh.*

Agents for respondents, Duke of Devonshire and others: *Currey, Holland & Co.*

[HOUSE OF LORDS.]

BLAIR AND OTHERS . . . . . APPELLANTS;

AND

ASSETS COMPANY, LIMITED . . . RESPONDENTS.

Scottish Law—Testing Clause in Marriage Contract—Liability of Law Agent for Carelessness.

A declaration inserted in the testing clause of a deed, which purports to affect or qualify any of the provisions in the body of the deed, has no legal effect.

Smith v. *Chambers* (5 R. 97) followed.

APPEAL from an interlocutor dated November 27, 1895, of the Second Division of the Court of Session, Scotland, which recalled the judgment of the Lord Ordinary (Kincairney) of June 18, 1895. The appellants, the defenders in the Court of Session, were John Blair and J. W. Young, both Writers to the Signet in Edinburgh, and the only known partners in the years 1878–9 of the dissolved firm of Messrs. Davidson & Syme,

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the law agents in the liquidation of the City of Glasgow Bank. The respondents were the Assets Company, who, by virtue of the City of Glasgow Bank (Liquidation) Act and the discharge of the liquidators, were entitled to the whole assets, choses in action, claims, and demands whatsoever vested in the bank and its liquidators. The following statement of the facts is taken from the judgment of Lord Watson:—

"This action was brought, in December, 1894, by the appellant company, who, in the year 1882, acquired by statutory title all assets and claims then vested in or competent to the liquidators of the City of Glasgow Bank. It is directed against the appellants, two members of the Society of Writers to the Signet, and concludes for payment of the sum of 7560*l.* 6*s.* 10*d.*, as damages resulting from their professional negligence, or want of reasonable skill, whilst they were acting as law agents of the liquidators in the year 1879."

"The Rev. Mr. Campbell, late minister of the parish of Monzievaird, was placed on the list of contributories as the holder of 200*l.* stock, upon which the calls made by the liquidators amounted to 5500*l.*, which he was unable to pay. He made proposals for a compromise, and with that view sent to the liquidators an offer of 1000*l.* for a full discharge of his liabilities, accompanied with a statement (1) of the whole estate and effects

(1) Mr. Campbell, in reply to certain queries, stated on oath: "My income is derived from three sources—1. Stipend as parish minster of Monzievaird, which on average of ten years has not exceeded 254*l.*; in addition there is manse and glebe, valued at 40*l.*, less drainage interest, 4*l.* 17*s.* 2. Income derived from stocks and shares. 3. My wife has a separate estate, the income of which for last year was 315*l.*; I enclose copy of our marriage contract."

The statement of his property was as follows: "1. Proceeds of 110*l.* Royal Bank stock at 193 and dividend, 217*l.* 6*s.* 2. Proceeds of 250*l.* North British Railway ordinary stock, 223*l.* 3*s.* 10*d.* 3. Claim of 77*l.* 17*s.* on Great North Road Turnpike Trust, Queensferry to Perth, valued at 50*l.* 4. Sum in deposit receipt by the Commercial Bank of Scotland, Crieff, 100*l.* 5. Sum in account current with ditto, 9*l.* 6. Furniture in manse of Monzievaird and stocking on glebe, 350*l.* 7. (1.) Sum in policy on my life with Standard Assurance Company, No. 30,937 A, dated January 19, 1859, for 300*l.*, 60*l.* 10*s.* 7*d.* (2.) Sum in policy on my life with Standard Assurance Company, No. 31,941 A, dated March 26, 1862, for 700*l.*, 118*l.* 13*s.*

Price of annuity on male of forty-five (this was Mr. Campbell's stipend of 254*l.*), 3758*l.* 7*s.* 3*d.*, one-fourth of which is 939*l.* 11*s.* 5*d.* = total brought out, 2068*l.* 4*s.* 10*d.*

then belonging to him, verified by his oath, and also a copy of his ante-nuptial marriage contract, executed in May and June, 1862. The latter is the document which has, after a lapse of fifteen years, given rise to the present litigation. The statement of his affairs so affirmed by the reverend gentleman did not include any interest in the estate of his wife. These papers were submitted to the appellants, and the liquidators, acting upon their advice, agreed to accept a payment of 1250*l*. The terms of compromise were approved by the First Division of the Court of Session, June 10, 1879, under whose superintendence the liquidation of the bank was conducted."

"The marriage contract contains, in that part of the deed where one would naturally expect to find it, a renunciation and discharge of the husband's jus mariti and right of administration over the whole estate then belonging to his wife, or which she might acquire or succeed to stante matrimonio. But at the end of the testing clause there have been inserted these words:—"

"'It being hereby declared before signing that while the jus mariti and right of administration of the said John Robert Campbell are renounced and excluded, such renunciation and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate, the said John Robert Campbell being entitled to draw the said annual produce or interest.'" (1)

(1) The following correspondence and account was produced to shew when the marriage contract was signed by either party:—

"J. & J. Miller, Writers, Perth, to Rev. J. R. Campbell, of Ardoch. Perth, June 2, 1862. 10 P.M. You have now subscribed the contract of marriage with Miss Jane Campbell on the understanding that a declaration of the following effect is to be inserted in the testing clause, and which you assure us is in accordance with Miss Campbell's desire, viz. it being hereby declared before signing that while the jus mariti and right of administration of the said Rev. John Robert Campbell is renounced and excluded, such renunciation and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell and not extend or apply to the annual produce or interest of her said estate, the said Rev. J. R. Campbell being entitled to draw the said annual produce or interest.

"And on receiving a letter from Miss Campbell that such is her wish, we undertake that such clause shall be so inserted in said marriage contract.—We are, &c."

"J. & J. Miller, W.S., Perth, to

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"It does not admit of controversy that if these words, instead of occupying their present position, had immediately followed the previous renunciation of the husband's legal rights, he would have been entitled to an annual payment of 315*l.*, which was not entered in his statement."

"The respondents aver that the appellants were under a duty (1), which they culpably and negligently failed to discharge,

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Miss Campbell, Moulin Manse, with note by her appended. June 2, 1862. Mr. Campbell had informed us that it is your desire that he shall have the full control of the annual proceeds of your property of every description, and in consequence an alteration is necessary in the contract signed by you. This we propose doing by inserting a declaration that Mr. Campbell's jus mariti and right of administration is only to be excluded in so far as regards the capital or principal of your estate, and this inserted will give him the absolute power of such annual proceeds.

"We confess we think this is going rather far in the circumstances, but if such is your deliberate wish, we must give up our opinion, in the hope that no circumstances may ever occur to render the want of the additional precautions we consider proper to be a matter of regret."

"Moulin Manse, June 3, 1862. 1.30 P.M. I approve of the proposed alteration on the contract. — Jane Campbell."

"Excerpt from Messrs. J. & J. Miller's Business Ledger, Account, Miss Campbell, Moulin. 1862. May 29. Attendance on Rev. J. R. Campbell going over draft contract, same fully adjusted and approved. Drawing contract of marriage, 6 sh.; extending, 6 sh., Stp. Writing you therewith for signature. June 2. Letter from Rev. J. R. Campbell fixing meeting to-night with us as to contract, and objecting to exclusion of right of administration. Attendance on him thereanent; contract signed under reservation of his rights as regards revenue—two hours. Writing him stating terms on which contract signed. Writing you thereof, and for your views. June 4. Letter from you approving of alteration on contract."

(1) The terms of the employment was contained in the following letter from James Haldane, liquidator, to Davidson & Syme. "10th January, 1879. City of Glasgow Bank. Dear Sirs—We should like if you would, as far as you can, verify the accompanying declarations, and favour us with your opinion as to the terms on which it would be advisable to settle with the declarants.

"1. No. 194, Rev. J. R. Campbell, holder of 200*l.* of stock."

[Other names followed; then—]

"The points to which your special attention is directed are—

"1. To satisfy yourself that the whole means possessed by the shareholder at 2nd October, 1878, are disclosed.

"In some cases the bank account of the shareholder—say for the year preceding that date, may be of use to you, as well as any books kept by the party, but you will use such materials as may be available in each case.

"2. You will report if any preferences have been given to other creditors.

"3. Generally you will report on what terms you recommend the liqui-

'to read the whole of the said marriage contract, including the clause above quoted, and to satisfy themselves thereby, and by ascertaining all the material facts, that the right to the said annual produce or interest was vested in, or at least might be lawfully and properly claimed to be vested in, the said John Robert Campbell, and to report to the said liquidators that no settlement should be concluded with the said John Robert Campbell except on condition of the liquidators receiving, inter alia, the said actuarial value or such sum as they might deem to be the value of the said John Robert Campbell's claim to the said annual produce or interest or an assignation or surrender of the said right or claim.' The respondents then make the alternative averment, that the appellants either culpably and negligently failed to read the whole testing clause including the words just quoted, or, having read these words, culpably and negligently failed to advise the liquidators to the effect just stated."

On November 27, 1895, the Second Division of the Court of Session (the Lord Justice-Clerk and Lords Young and Trayner), in a judgment of a few lines, recalled the Lord Ordinary's interlocutor assoilzing the defenders from the conclusions of the libel; and remitted the case back to the Lord Ordinary to allow the parties a proof of their averments. Against that decision the appellants brought this appeal.

May 12. *The Lord Advocate* (*A. Graham Murray, Q.C.*) and *Ure* (with them *J. Wilson* and *A. W. Watson*), (all except the last of the Scottish Bar), for the appellants. No actionable negligence is averred. Davidson & Syme had a decision of the First Division before them that a declaration in the testing clause was of no effect to alter an express provision in the previous and appropriate part of the deed: *Smith* v. *Chambers*. (1)

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dators to grant a discharge, and how it is to be carried out, whether by payment in cash or by conveyance of securities.

"You may please put your report in a succinct form on a separate sheet of paper and attach it to the declaration in each case. You may also be so good as to note your fee on each report."

(1) 5 R. 97, at pp. 109–112.

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There is no doubt that when that case was in this House Lord Gordon alone took the view that the First Division was wrong. But Lords Hatherley (1), Lord O'Hagan (2), and Lord Blackburn (3) considered it wholly unnecessary to decide the question raised on the testing clause, and the appeal was allowed on another point. *Dunlop* v. *Greenlees* (4) was a decision of this House; but it was perfectly distinct from this case. What was decided there was that the testing clause can be looked at to see the character in which the spouse signed the deed. *Johnstone* v. *Coldstream* (5) was a similar case. These cases do not warrant the view that it is competent to insert such a declaration like that now in dispute in a testing clause. A deed sent to be signed generally has a space marked off in pencil, and the person signing is asked not to sign there. Then, after signing, this space is filled up. Here the lady signed on May 31, and the husband on June 2; and the testing clause was inserted, in fact, after both had signed. Therefore the testing clause cannot be said to be the act of the parties at all. A law agent does not warrant the soundness of his advice. It is of the very essence of such an action as this that there should be proof of some gross negligence: see Lord Brougham in *Purves* v. *Landell*. (6) The whole gist of this action is that the Rev. Mr. Campbell was entitled to the income of the fund, whereas he was not.

Balfour, *Q.C.*, and *Charles D. Murray* (both of the Scottish Bar), (with them *Cozens-Hardy*, *Q.C.*), for the respondents. Any number of provisions may be inserted in the testing clause with the consent of the parties. The authority may be verbal. And no period has been fixed beyond which the testing clause may not be filled in, provided that it be done bonâ fide and from sufficient materials: *Blair* v. *Earl of Galloway*. (7) In that case it was filled up after the lapse of thirty-two years. The validity of alterations made by the testing clause in other parts of the deed was not doubted until Lord Ivory's judgment in *Johnstone* v. *Coldstream*. (8) In *Brown* v. *Govan* (9) it was

(1) 3 App. Cas. at p. 807.
(2) 3 App. Cas. at p. 813.
(3) 3 App. Cas. at p. 819.
(4) 3 M. (H.L.) 46.
(5) 5 D. 1297.
(6) 4 Bell's App. at p. 57.
(7) 6 S. (2nd ed.) p. 57.
(8) 5 D. at p. 1302.
(9) 20 Fac. Coll. 94; February 1, 1820.

assumed that no objection could be taken to the testing clause. There Robert Lang in his contract of marriage executed in 1807 obliged himself to pay a jointure to his wife, and to the children of the marriage, upon their attaining the age of majority or being married, the sum of 1200*l.* There was afterwards inserted this declaration in the testing clause: "In witness whereof these present wrote on this and the three preceding pages of stamped paper by W. S., clerk to J. S., writer in Glasgow, are subscribed: Declaring before subscription that the 300*l.* and the 1200*l.* sterling before provided shall not be payable till twelve months after the said Robert Lang's decease notwithstanding any prior declaration to the contrary, and shall only bear interest after that period till paid: These presents are subscribed by the parties at Glasgow the 3rd of March 1808 before these witnesses, D. M., writer in Glasgow, and the said W S." (1) And Lord Glenlee said: "I hold the case just the same as if the clause at the end of the contract had been inserted in the former part of the deed." (2)

[*The Lord Advocate.* The testing clause quoted shews there were two testing clauses in that case.]

Dunlop v. *Greenlees* decided that some alteration can go into the testing clause: see Lord Westbury. (3) In *Johnstone* v. *Coldstream* (4) the testing clause brought in a new party, and it was held good.

[LORD HERSCHELL. Those cases are good law. There has, in fact, been an exception engrafted on the testing clause.]

Secondly, taking the alteration as in law an unwarrantable interpolation, the alteration here had been assented to, and a marriage had followed; therefore the testing clause had become binding: *Wemyss* v. *Wemyss* (5); *Nisbet* v. *Newlands* (6); *Busby* v. *Renny* (7); *Falconar* v. *M'Leod* (8); *Lang* v. *Lang.* (9) Therefore, at all events, the appellants were negligent in not seeing that the clause had become binding by the acts of the parties.

(1) Extract from the Session Papers.
(2) 20 Fac. Coll. 97; February 1, 1820.
(3) 3 M. (H.L.) at p. 49.
(4) 5 D. 1297.
(5) Mor. Dict. 9174.
(6) Mor. Dict. 17,016.
(7) 4 S. (2nd ed.) 112.
(8) 8 S. 312.
(9) 16 R. 590.

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LORD HALSBURY L.C. This is an action brought by the Assets Company, whose title to sue I will assume, against the partners in a firm of writers to the signet in consequence, as the pursuers allege, of loss sustained by reason of the negligence of the defenders. It appears that the firm in question were retained by the Assets Company to advise them in respect of certain compositions which were being negotiated between themselves and the shareholders of the Glasgow Bank in liquidation. The particular shareholder, the Rev. John Campbell, was liable to the extent of upwards of 5000*l.* for unpaid calls, and it became material for the pursuers to ascertain what was the extent of his property, in order to judge whether they would or would not accept the composition offered by him in respect of his liability.

The only question in debate was whether they, the defenders, ought to have reckoned as part of his estate the income of his wife's separate property. The pursuers contend that the marriage settlement made that income part of Mr. Campbell's own property, and therefore to be reckoned as one of the items to be taken into consideration in relation to the composition to be accepted. The appellants, the defenders, contend that the marriage settlement made it irrevocably the property of the wife; and the contention on the other side as to the liability of the defenders depends very much upon what is to be called in strictness the marriage settlement. There is no doubt that in one part of the parchment writing signed by the spouses (though at different times under circumstances I shall have to refer to hereafter) there appears in writing a declaration that the renunciation by Mr. Campbell of his jus mariti, which was absolute and unqualified in the earlier part of the instrument, was only to apply "to the capital or principal of the estate of Jane Campbell, the wife."

An important part of the discussion (though for reasons to be given hereafter I think not a conclusive part) relates to the place and the date at which this renunciation was written on the original parchment. But for the technicalities and the usage of Scottish conveyancing I should myself have said that the words I have quoted as existing on the parchment writing

formed no part of the deed at all; but apparently it has been the practice, sanctioned by decision, to consider the attestation clause a part of the deed, and so to comply with the ancient Scottish statutes, though I cannot but think in requiring the witnesses to be designed in the body of the deed these statutes contemplated an attestation *of* the deed and not *in* the deed. The designing of the witnesses was required apparently for the purpose of ascertaining beyond dispute who the witnesses were to be, that they should be named and described in the body of the deed itself. The very distinction "in the body of the deed" would seem to shew that this was what was originally contemplated.

The practice, however, appears to have grown up (probably for convenience sake) that after the parties have attached their signatures to that which was in truth the bargain to which both the minds had assented, a space should be left between the end of what I call the deed and the signatures to enable the attesting clause to be added and so satisfy the words "in the body of the deed," and no limit appears to have been placed by Scottish law as to the interval which might elapse between the signature of the parties to what they had agreed to and the addition of the attesting clause. So that in one case thirty-two years have been held not too long an interval within which the attestation clause may be added. The very words by which the attesting clause begins, "In witness whereof," seem to shew what is the true construction of what the attesting clause must be: We who are the witnesses hereto are putting our names to this written instrument to which the parties *have* agreed.

The contention before your Lordships apparently is that this attestation clause may legitimately be used for the purpose of introducing new stipulations, and even, as in this case, for qualifying and even contradicting the instrument which had previously been agreed upon and signed. In Scottish law, as in English, a deed is described as a solemn instrument, and with the same object in both countries. That is, it is intended to place beyond the doubts incident to any transaction where an infirm memory, not assisted by any written record of what has taken place at some distant interval, may fail to describe

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accurately what the agreement was. The proof of deliberation and authenticity was to be secured in various ways: sealing, at one time required in both countries as it is now required in this; signature by various statutes; delivery, and so forth. These are various expedients to preserve the evidence of things agreed upon: equally against failure of memory as against the commission of fraud, or the conflict between the parties as to what has taken place. If, however, new stipulations can be introduced many years after the parties have come to their agreement, and can either qualify or contradict the agreement by putting into the form of attestation such qualifications or contradictions, what becomes of the finality of a deed?

It is nothing to the purpose to suggest that if challenged you must prove the assent of the parties to the new matter thus introduced by the attestation clause. You can only prove it by the very means which the existence of a deed at all was intended to prevent the necessity of having recourse to; and it is manifest that if you can alter or qualify a deed by the introduction of verbal evidence, its function as a deed is gone.

The authority of the Court of Session itself had decided (1), not very long before the transactions now in question, that such a provision in the attesting clause of a deed was ineffectual to restrict the operation of what I have called the deed itself; and I concur both in the decision itself and in the reasoning by which that decision was supported.

My Lords, I do not stay for the moment to comment on what might be the operation on the minds of the defenders here of that decision, because I propose to treat more at large the question of the alleged negligence. But, speaking of the matter of law only, I think that was the law of Scotland, and I think nothing has passed in your Lordships' House which can qualify or cut down that decision. In saying that I do not omit to consider the observations of Lord Gordon in *Smith* v. *Chambers*. (2) I think the noble and learned Lord was in error in supposing that there was any conflict between the judgment of your Lordships in *Dunlop* v. *Greenlees* (3) and the decision

(1) *Smith* v. *Chambers*, 5 R. 97. (2) 3 App. Cas. at p. 827.
(3) 3 M. (H.L.) 46.

in *Smith* v. *Chambers*. In the case referred to by Lord Gordon (1), all that had to be proved was the wife's consent to a provision for herself, and she put her signature "in token of her consent to and approval of the foregoing settlement."

It appears to me that, whether she signed that consent in the attesting clause or on the paper in which the deed was wrapped up, her consent was effectual. In a strict sense her signature of the deed, although it was written on the same parchment, and although included in what was described as an attesting clause, was no signature to the deed. She was no party to the deed. Her signature had no operation in the deed as a deed. Her signature only operated as a conclusive proof that she had assented to that provision for herself in the deed, and she might just as easily have established that consent by a separate and independent writing altogether.

It appears to me that the diligence of the learned counsel has failed to discover any authority which justifies the proposition now contended for. The only case (2) suggested to be in point is one in which, as my noble and learned friend Lord Watson pointed out, it would have been impossible for the parties, representing the interests they did, to urge the objection now insisted on.

But I will now assume that the question is more open to doubt than I think it is. Can it be gravely contended that a writer to the signet in Scotland can be made liable in an action for negligence because his opinion has coincided with the unanimous judgment of the Court of Session? As I have said, I think the judgment in *Smith* v. *Chambers* (3) on this point was perfectly right. But suppose for a moment that Lord Gordon's (1) observations should have made the defenders doubtful of the accuracy of the decision in *Smith* v. *Chambers* (3), does it follow that they would be negligent for advising their clients to accept the composition? They might well and most prudently think it was better to accept the composition offered than to incur the risk of a law-suit to be carried to your Lordships' House in order to solve those doubts. That the same

(1) See 3 App. Cas. at p. 828–9.
(2) *Brown* v. *Govan*, 20 Fac. Coll. 94; February 1, 1820.
(3) See 5 R. 97.

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Court before which an approval of the composition in question was to come in the first instance would adhere to their own decision was tolerably certain, and therefore the proposition must be, that to accept a composition—which for the moment I will assume to be not all that could have been obtained—rather than incur the expense of an appeal to your Lordships' House, was negligence. That is too absurd, as it appears to me, to require more than the statement of the proposition. Besides negligence, the plaintiff in such an action is bound also to prove the loss or damage in consequence of the negligence. Is it susceptible of proof that, if Mr. Campbell had been driven to extremities, more could have been obtained in any view of this case? I think not.

My Lords, I concur entirely with the very powerful reasoning of Lord Kincairney, and I only regret that the judges of the Second Division did not deal with his judgment in such a way as to allow your Lordships to understand why they did not accept his reasoning.

[His Lordship then moved the order at the end of the report.]

LORD WATSON. [His Lordship stated the facts given above, and continued:—] My Lords, in my opinion the relevancy of these averments entirely depends upon the proposition that the words so introduced into the testing clause form part of the deed, and must as such receive their full legal effect. If that proposition fails the other averments of the respondents amount to nothing more than this, that before marriage there was an informal agreement between the future spouses to alter the terms of their probative deed. As might have been expected, Mr. Balfour did not maintain that such an agreement could per se prevail against the deed; but he argued at some length that the agreement was after marriage so validated rei interventu as to have that effect. Upon the general question as discussed by the learned counsel I do not find it necessary to express any opinion. His argument completely ignored the well-known rule of Scots law, which regards such acts of rei interventus by a wife after marriage, or even a formal ratifica-

tion by her, as a donatio inter virum et uxorem which she can revoke at pleasure.

Two years before the date of the acts of negligence imputed to the appellants, the learned judges of the First Division had unanimously decided in *Smith* v. *Chambers* (1), that words similarly introduced into the testing clause of a trust disposition and settlement, which materially qualified one of the directions previously given by the testator, were of no legal effect. Upon that point separate judgments were delivered by Lords Deas and Mure, and by my noble and learned friend opposite (Lord Shand), with the concurrence of the late Lord President Inglis. It does seem rather extravagant that a Scottish law agent should be accused of negligence and want of skill because, in advising the liquidators as to the terms of a compromise, he accepted the law laid down by the same judges who had the control of the liquidation, and whose sanction to the compromise was requisite.

If the judgment of the Court of Session in *Smith* v. *Chambers* be according to law, it necessarily follows that the present action is groundless. That decision was accordingly strenuously impeached by the respondents' counsel, partly upon the authority of previous decisions with which it is said to conflict, and partly on the strength of observations made by my predecessor, Lord Gordon, in the case of *Smith* v. *Chambers* when it came by appeal to this House. (2) The other noble and learned Lords who were present when the appeal was disposed of did not find it necessary to consider that part of the case which related to the testing clause of the deed, and expressed no opinion upon the point. In deciding *Smith* v. *Chambers* (1) the judges of the First Division had, of course, no opportunity of considering the remarks subsequently made by Lord Gordon (3); but all the authorities cited to us in the course of the argument for the respondents, with the exception of *Brown* v. *Govan* (4), which has been exhumed by the industry of their counsel, were carefully examined and discussed by Lord Deas, who also refers to a number of other authorities which have not been

(1) 5 R. 97.
(2) 3 App. Cas. 795.
(3) 3 App. Cas. 827, et seq.
(4) 20 Fac. Coll. 94; February 1, 1820.

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cited by the respondents' counsel, but are by no means favourable to the respondents' contention.

The testing clause of a probative deed, which is an anomalous feature of Scottish conveyancing, apparently owes its origin to 1681, c. 5, which enacts that "all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses," and also "that in all the said cases the witnesses be designed in the bodie of the writ, instrument, or execution respectively, otherwise the same shall be null and void, and make no faith in judgment, nor out-with." The Act appears to me to contemplate that these requisites shall be inserted in the body of the deed before it is executed by the subscriptions of the parties to it and of their attesting witnesses. That course might be possible in cases where there was only one party to the deed, or where several parties and their witnesses were all present for the purpose of its execution at the same time and at the same place. But it became a practical impossibility in cases where a deed was executed by several parties and their respective witnesses at different times and in different places. In order to meet the difficulty the practice was introduced, and sanctioned by decisions of the Court, of filling in the testing clause after the deed had been executed by all the parties and their witnesses at any time before the deed was recorded in a public register, or produced in judgment. Mr. Bell (Principles, s. 2226) justly observes that it is "a very dangerous practice." In *Blair* v. *Earl of Galloway* (1) it was held that a testing clause might be lawfully inserted by the holder of the deed after the lapse of thirty-two years, one of the learned judges observing, "As to the defect in the execution of the deed, there is nothing in the law of Scotland requiring the testing clause to be filled up within a specified period; and I therefore consider the objection to be a great deal too critical."

Their admission of the practice which has just been noticed involved the judges of the Court of Session in the unpleasant consequences which inevitably attend the affirmation of two

(1) 6 Shaw, 51.

propositions which are self-contradictory. On the one hand it compelled them to hold, fictione juris, that the testing clause had actually been filled in before execution of the deed, and had been subscribed by the parties and their witnesses. On the other hand it equally compelled their recognition of the fact, that according to the practice which they themselves had sanctioned, and which was generally if not invariably followed, the testing clause formed no part of the deed at the time of its subscription, but was or might have been added after the deed had been formally authenticated by the signatures of the parties to it, and of the attesting witnesses. In these circumstances, it appears to me to be clear beyond doubt, that a testing clause which may have been, and probably was, inserted after subscription ought not to contain, and cannot legitimately contain, any terms which would, if given effect to, cut down or modify the agreement which the parties had, in point of fact, executed. I am not prepared to go that length, unless constrained by clear and cogent authority, which I have been unable to find, either in the argument of the present respondents, or elsewhere. It would be an extraordinary state of the law, if one of the parties to a deed, who had the custody of it, could, after the lapse of twenty or thirty years, and after the death of some or all of the parties to it, alter its whole tenor and effect by the insertion of a testing clause. But that is the logical result of the argument addressed to us for the respondents.

In my opinion, it is not immaterial to notice the facts and allegations which are before us in the present case, bearing upon the time at which the testing clause of the marriage contract was written into the deed, which was executed by the wife on May 31, and by the husband on June 2, 1862. The insertion must have been made on or before June 5, because, on that day, the instrument, with the testing clause as it now stands, was duly recorded for preservation in the books of Council and Session. But the productions made along with the record, and relied on by the respondents as shewing that the lady consented to an alteration of the terms of the deed, also shew conclusively that no proposal for an alteration was made to her until June 2, two days after her signature had been adhibited

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and attested; and that her husband, in like manner, subscribed the deed without the alteration, upon the written assurance of his law agents that it would be subsequently inserted in the testing clause.

I am satisfied with the judgment of the First Division in *Smith* v. *Chambers* (1), which, in my opinion, is decisive of the present case; and I entirely concur in the exhaustive exposition of the law and examination of previous decisions which is to be found in the opinion delivered by Lord Deas. I do not propose to occupy your Lordships' time by repeating the reasoning of Lord Deas, and shall content myself with a brief reference to two authorities relied on by the respondents, which, as already stated, are not noticed in his Lordship's opinion.

The case of *Brown* v. *Govan* (2) appears to be a recent discovery. It is not surprising to find that it was neither cited nor commented upon in *Johnstone* v. *Coldstream* (3), *Dunlop* v. *Greenlees* (4), or in *Smith* v. *Chambers* (1), because the question which is involved in these cases and arises for decision in this appeal was not there raised, and no judicial opinion was expressed upon it. According to the report, a father by his contract of marriage made certain provisions in favour of the children of the marriage, payable on their attaining majority or being married; and by a subsequent declaration he postponed the period of payment until twelve months after his decease. During his lifetime he made a conveyance of heritable subjects to his children, in security of their provisions, upon which they were infeft. After his death the trustee in his sequestration brought a reduction of the conveyance and sasine following upon it. It was suggested by the respondents that the declaration postponing the period of payment was only to be found in the testing clause of the contract; and they read some extracts from the Session papers, which did not satisfy me that such was the case. Whether it was so or not is to my mind immaterial. If the fact was as represented, it is clear that the children, who were the only persons having an interest to raise the point, did not attempt to do so. The only defence upon which they

(1) 5 R. 97; 3 App. Cas. 795.
(2) Fac. Coll. 94; February 1, 1820.
(3) 5 D. 1297.
(4) 2 M. 1; 3 M. (H.L.) 46.

relied was, that the heritable security which they had obtained from their parent was in law equivalent to payment of their provisions.

There only remains to be noticed the opinion expressed by Lord Gordon in *Chambers* v. *Smith* (1), which was undoubtedly adverse to the unanimous decision of the Court below, in relation to the testing clause of Dr. Chambers' settlement. That point was not disposed of by the House; and, seeing that the opinion expressed by the noble and learned Lord was strictly obiter, I feel at liberty respectfully to differ. It was mainly rested upon the ground that the decision of the learned judges of the First Division was at variance with the judgment of this House in *Dunlop* v. *Greenlees*. (2) The two cases were, to my mind, essentially dissimilar. In *Chambers* v. *Smith* (3) the effect of the testing clause was to alter materially one of the directions of the trust created by the testator. In *Dunlop* v. *Greenlees* the words introduced into the testing clause were merely descriptive of the object with which Mrs. Greenlees, who was not a party to the deed, subscribed her husband's settlement. They did not alter or affect a single provision made by the testator; and, in my opinion, if they had been omitted from the testing clause, the legal inference deducible from the bare fact of her subscription would have been precisely the same.

For these reasons, I am of opinion that the order appealed from ought to be reversed, and the interlocutor of the Lord Ordinary restored; and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL. I am entirely of the same opinion. The matter has been so fully treated by my noble and learned friends who have preceded me that I shall not detain your Lordships long.

It is admitted by the learned counsel for the respondents that unless the condescendence discloses a case of negligence against the appellants, whereby the respondents have been damnified,

(1) 3 App. Cas. at p. 827. (2) 3 M. (H.L.) 46.
(3) 5 R. 97; 3 App. Cas. 795.

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there was no necessity to send this case to proof, and that the interlocutor of the Lord Ordinary ought to have stood.

I think the case might really be disposed of upon a very short point. The negligence charged is that the appellants, being professional men, advised the respondents erroneously—so erroneously as to be negligent—upon a question of law. At the time they gave their advice a decision had been arrived at by the very Court under whose superintendence the liquidation was being conducted, which the learned counsel for the respondents have not attempted to distinguish from the present case; and that decision was in exact accordance with the advice which the appellants gave to those who had employed them. The utmost that could be said is that subsequently to that decision, namely, when the case then in the Court of Session came before this House, where it was reversed upon another point, one of the noble and learned Lords expressed a doubt whether, upon the point which is now of importance, that case (*Smith* v. *Chambers* (1)) was rightly decided. My Lords, it was no part of the necessary duty of the appellants to discuss the questions of law which might arise upon the matters upon which they were asked to advise. I can see not the faintest shadow of ground for alleging that in giving the advice they did they displayed any want of care whatsoever. That would be enough to dispose of the case.

But, inasmuch as the question of law whether the case of *Smith* v. *Chambers* (1) was correctly decided or not has been elaborately argued and is of great importance, I think it right to say that I have arrived at the same conclusion as my noble and learned friends have already expressed. I cannot entertain any doubt whatsoever that *Smith* v. *Chambers* (1) was a perfectly sound and correct exposition of the law of Scotland. If there had been a long course of decisions to the contrary effect one might have been bound to give effect to them and to hold that the law of Scotland, as regards deeds and their execution, was in a condition so lamentably unsound and unreasonable as to require immediate amendment. But no such decisions have been furnished. The purpose and object

(1) 5 R. 97; 3 App. Cas. 795.

of parties in reducing their agreements into writing and executing a deed which contains them is that, being thus solemnly recorded, no question shall arise afterwards as to what their agreement really was. It is not to depend upon infirmity of memory as to what passed between them. It is not to be liable to fraudulent misrepresentation as to what the agreement really was. The matter is to be put beyond doubt by a written instrument signed by the parties, their signatures being attested. If the law of Scotland were as the respondents contend it is, to my mind the value of a deed would be absolutely and utterly destroyed. What would be the use of parties solemnly recording the agreement which they had come to, signing the deed and having their signatures attested, if one of the parties afterwards, in whose custody the instrument was, behind the back of the other, could insert in the testing clause (which it would be perfectly proper for that party to fill in without reference to the other) a provision repugnant to some of the stipulations of the deed which the parties had signed? That might be perfectly honestly done, but the matter might never come to the notice of the other party until some dispute arose years afterwards; it might, indeed, never come to light until all the parties to the transaction were dead, and all that could be referred to was the instrument itself; and yet the provision thus inserted ex post facto in the instrument by one of the parties would inevitably control their rights, and might impose obligations or destroy rights which had been stipulated for and agreed to and embodied in the deed which had been signed and attested.

One need only state such a proposition to see that it would be impossible to maintain it on any ground of principle, and that, as I say, one could only give one's assent to it if constrained to do so by an overwhelming weight of authorities. But no such authorities have been produced: the case of *Johnstone* v. *Coldstream* (1) and the case of *Dunlop* v. *Greenlees* (2) appear to me to be cases as far as possible removed from the case of *Smith* v. *Chambers* (3) or the present case.

(1) 5 D. 1297. (2) 2 M. 1; 3 M. (H.L.) 46.
(3) 5 R. 97; 3 App. Cas. 795.

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The point that was decided by the Court of Session in *Johnstone* v. *Coldstream* (1), and by the Court of Session and this House in *Dunlop* v. *Greenlees* (2), was entirely different from the present. The only prior case not reviewed in the judgment of *Smith* v. *Chambers* (3) is the case of *Brown* v. *Govan*. (4) I agree with my noble and learned friend Lord Watson, and for the reasons he has given, that that really is not a case in point at all.

For these reasons, my Lords, I think that, not only was there no case of negligence against the appellants, but that the opinion which was involved in the advice which they gave with regard to the law of Scotland was perfectly correct.

LORD SHAND. I also am of opinion that the facts stated by the pursuers do not warrant the conclusion of liability for damages on the part of the law agents who are sued in this action.

The whole case of the pursuers, the Assets Company, seems to depend on their establishing that the provision which was inserted in the testing clause of the marriage contract was effectual. If it was not so, the pursuers have failed to shew that they have suffered any loss whatever on the facts stated.

By the provision contained in the marriage contract as it was signed by Mrs. Campbell, it was declared that her husband renounced and discharged "his jus mariti and right of administration over the whole estate presently belonging to her or which she might acquire or succeed to stante matrimonio." With that clause standing as a part of the deed she signed it. But days after she had signed the deed, when this testing clause was filled in, there was a most important stipulation added, repugnant to that which was contained in the deed when she signed it. It was to this effect: "Such renunciation" (that is the renunciation I have just read) "and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell and shall not extend or apply to the annual produce or interest of her said estate."

(1) 5 D. 1297.
(2) 2 M. 1; 3 M. (H.L.) 46.
(3) 5 R. 97; 3 App. 795.
(4) 20 Fac. Coll. 94; February 1, 1820.

My Lords, I am clearly of opinion, as I think all your Lordships are, that this alteration, seriously affecting a provision of the deed as it left the hand of the lady, as she signed it, was ineffectual.

Having taken part in the decision of *Smith* v. *Chambers* (1), I do not propose to enter upon the grounds of that judgment. I might well have been silent in the First Division of the Court of Session after the elaborate and careful judgment of Lord Deas; but I find on looking to the report (2) that I went fully over the grounds of my own opinion, and I do not think it necessary to add anything to what I there said.

Although I do not say that it is very material, still it is worthy of observation that in one aspect of this case it is more unfavourable for the present pursuers than what occurred in the case of *Smith* v. *Chambers*. The Lord Ordinary, Lord Kincairney, in the careful, exhaustive and closely reasoned judgment which he has given in this case, makes this observation in reference to *Smith* v. *Chambers* (1): "In *Smith's Case*, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of a deed, which may be held to be settled law, but also on the assumption that in that case, it was added before the granter's signature, and was itself authenticated. But if it were shewn in this case that the clause was added a couple of days after Mrs. Campbell signed the deed, as seems probable, that might differentiate the two cases." Having refreshed my memory from the report of that case, I agree in the opinion Lord Kincairney states. I think there the Court gave their judgment upon the assumption that the addition had been made before the granter's signature. But in this case the matter stands very differently; for it is admitted, and it appears to be perfectly clear upon documents which the pursuers have themselves produced, that the lady signed the deed on May 31, and that the alteration was made days afterwards, certainly not earlier than June 3, when the marriage was just about to take place. It is, therefore, a clause that is unauthenticated in any way by the signature of the lady who is said to be bound by it. That appears to me to

(1) 5 R. 97; 3 App. Cas. 795. (2) 5 R. at p. 125.

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illustrate the dangers there would be in giving to the alterations inserted in a testing clause the extraordinary effect which is contended for by the respondents in this case.

It is true they have said that this feature of the case may be overcome. It was said by Mr. Balfour in his able pleading that he was prepared to prove authority—practically by parol evidence—for the change that was made in the testing clause altering the deed. And again, it was said there was another answer to the defender's argument, namely, that the deed had been acted upon by the spouses in such a way as to shew that the provision added in the testing clause was really a provision to which the spouses intended to give effect.

As to the proof of authority, it is obvious that evidence of that kind would be incompetent to control a solemn deed. It is really a proposal to control the written instrument by parol evidence—it might be by evidence of witnesses—as to what had occurred in conversations. It happens here that the evidence would be fortified by a signature given by the lady to a document in which she said, "I approve of the alteration"; but that practically would be nothing stronger than parol evidence to cut down the effect of a deed deliberately entered into. Plainly, therefore, that answer could not be successfully maintained.

As to the acting of the parties, it is said that the lady, from the time of the marriage onwards, allowed her husband to draw this annual income. As was observed by my noble and learned friend opposite (Lord Herschell) in the course of the discussion, there is nothing more common than for a wife, although she has an income settled upon herself, to arrange that the husband shall draw it from time to time, and that arrangement goes on so long as it is satisfactory. Therefore, I should attribute no important effect to actings of that kind. But it must be further observed that actings after the marriage could surely never be allowed to construe or control the direct obligations of the parties as those are recorded in the deed which the parties had signed.

I have come to the conclusion without difficulty that there has been no allegation of such negligence on the part of the

agents as would involve responsibility for damages under the claim made upon them. The clause was ineffectual as an alteration on the provision of the deed as to the lady's estate, and it was therefore of no consequence whether the agents did or did not read it.

It is true that after the date when *Smith* v. *Chambers* (1) was decided in the Court of Session, Lord Gordon, on an appeal to this House, expressed, I will not say a distinct opinion that that judgment was wrong, but at all events a strong opinion that, according to his view, sufficient effect had not been given to certain previous cases; but it is worthy of notice that in the opinions which were delivered in the First Division of the Court these cases were discussed; they were fully before the Court, and I think it was unanimously held that they were quite distinguishable from the case then before the Court. I believe several of your Lordships have already expressed that view.

Lord Kincairney very justly observes in his opinion that the instructions given to the agents "were as they are averred by the pursuers, to satisfy themselves as to the facts and to advise the liquidators as to the terms on which they ought to settle." That was an instruction to give their final opinion upon the whole matter as to what they thought would be reasonable terms, and as to whether the terms which had been offered were reasonable or not. As he says in a subsequent passage, "but it is said that it was their duty to tell the liquidators that the question was not closed and that opposing opinions had been expressed about it. It might have been proper enough to do that; but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities." I concur in these observations by Lord Kincairney. The law agents in the circumstances might well hold the opinion, which I think was a sound opinion, that Mr. Campbell had no right whatever to

(1) 5 R. 97; 3 App. Cas. 795.

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the income of the capital belonging to his wife; and, entertaining that opinion, I think it cannot be maintained that they were bound to enter into details of the kind which have been suggested by the present respondents.

On these grounds, I am of opinion with your Lordships that we should revert to the opinion of Lord Kincairney and reverse the interlocutor of the Second Division.

LORD DAVEY. I am of the same opinion. It appears to me that those who maintain the doctrine that the substantive provisions in the earlier part of the deed may be varied by words introduced into the testing clause, rest their argument on the legal presumption that everything in the deed was there before execution by the parties. Legal presumptions are very good and useful things when properly applied, but they ought not as a rule to be introduced in plain contradiction of the facts or the settled usage of mankind. It has been decided and is now settled law that the testing clauses may lawfully and properly be inserted after execution, and it is admitted that such is the almost invariable practice. When once that has been decided it appears to me that the legal presumption referred to no longer applies to the testing clause, and the real presumption of fact is the other way. The considerations of convenience and the inveterate practice which led to its being held that the testing clause may be inserted after execution by the parties have no application to words contained in the testing clause which have the effect of varying the provisions contained in the earlier part of the deed. It is in this sense that I understand and appreciate what has been said by learned judges, that the testing clause is not the proper place in which to introduce substantive provisions.

But, my Lords, if I felt more doubt than I do as to the correctness of the decision of the Court of Session in *Smith* v. *Chambers* (1), it seems to me, as it does to your Lordships, extravagant to hold that law agents were guilty of actionable negligence because they gave advice to their clients which involved the assumption that a recent and unanimous decision

(1) 5 R. 97.

of the very judges before whom the question would come was correct. I say this notwithstanding the obiter dictum of Lord Gordon in this House in *Smith* v. *Chambers*. (1) That noble and learned Lord assumed, as I think erroneously, that the decision of the Court of Session in *Smith* v. *Chambers* (2) was inconsistent with *Johnstone* v. *Coldstream* (3) and *Dunlop* v. *Greenlees*. (4) I may remark that Lord Deas, who delivered the leading opinion in *Smith* v. *Chambers* (2), was a party to the decision of the Court of Session in *Dunlop* v. *Greenlees*. (4) That learned judge thought the latter decision right and not inconsistent with the opinion he was delivering in *Smith* v. *Chambers*. (2)

It does not very clearly appear what facts the Inner House desired proof of in this case. I am of opinion with the Lord Ordinary that no evidence is required for the decision of the case, and I think his judgment should be restored.

Ordered, that the interlocutor of the Second Division of November 27, 1895, *complained of in the appeal be reversed: That the interlocutor of the Lord Ordinary dated June* 18, 1895, *be restored: and that the cause be remitted to the Court of Session in Scotland, with directions to find the appellants entitled to the expenses incurred by them in the Court of Session from and after the date of the interlocutor restored: Further Ordered, that the respondents pay the appellants the costs incurred in respect of the appeal.*

Lords' Journals, May 15, 1896.

Agents for appellants: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

Agents for respondents: *William Robertson & Co., for J. Smith Clark, S.S.C., Edinburgh.*

(1) 3 App. Cas., at p. 827–8.
(2) 5 R. 97.
(3) 5 D. 1297.
(4) 2 M. 1; 3 M. (H.L.) 46.

[HOUSE OF LORDS.]

H. L. (E.) 1896 *May* 4.

THE MAYOR, &c., OF TUNBRIDGE WELLS . . . . . } APPELLANTS;

AND

BAIRD AND OTHERS . . . . . RESPONDENTS.

Local Government—"Street"—Urban Authority—Vesting of "Street" in Urban Authority—Public Health Act 1875 (38 & 39 *Vict. c.* 55) *ss.* 39, 149.

The Public Health Act 1875, which by s. 149 vests certain streets in the urban authority, does not vest the subsoil.

Therefore where a local Act authorized the urban authority to erect and maintain "in any street or public place, or on land belonging to them or under their control," lavatories for the use of the public:—

Held, that the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them within the meaning of the Public Health Act 1875.

The decision of the Court of Appeal ([1894] 2 Q. B. 867) affirmed.

THE predecessors in title of the respondents were owners of the freehold of "the Pantiles" in Tunbridge Wells. The Pantiles is the name for a street or public place on which houses and shops are built and to which people resort to drink the waters and enjoy themselves. For the purposes of this report it is to be taken that the Pantiles is a "street" within the Public Health Act 1875 and as such vested in the appellants as the urban sanitary authority. In that capacity the appellants excavated the soil under part of the Pantiles and made lavatories, water-closets and urinals below the surface. The respondents having brought an action against the appellants claiming a declaration that the appellants were not entitled to do this, and a mandatory injunction to remove their works, &c., the appellants justified under the Public Health Act 1875 and the Tunbridge Wells Improvement Act 1890 ss. 93, 284.

Grantham J., before whom the action was tried without a jury, gave judgment for the defendants. The Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.) set aside this judgment and ordered judgment to be entered for the plaintiffs, with a

declaration that the plaintiffs were entitled to the soil in which the lavatories, water-closets and urinals had been erected and that the defendants were not entitled to them or the use of them without the plaintiffs' consent. (1) The defendants brought this appeal.

The material parts of the Tunbridge Wells Improvement Act 1890 (c. ccxxxv.) were as follows :—

" Sect. 93. The corporation may erect and maintain or permit to be erected and maintained in any street or public place, or on land belonging to them, or on land belonging to any person with the consent of the owner, lessee, and occupier thereof for the time being, water-closets urinals and lavatories for the use of the public, and may charge for the use of such water-closets and lavatories erected and maintained by them such sum as they may think proper. . . ."

" Sect. 284. It shall be lawful for the corporation at any time and from time to time to erect and to maintain shelters, band stands, lavatories and other places and conveniences for the use accommodation and recreation of the inhabitants of and visitors to the borough on suitable sites, with the consent of the owner and occupier, on any land within the borough or on any other land within the borough now or hereafter belonging to the corporation or under their control. And for the purposes of this section the corporation may by agreement acquire and hold any land within the borough not exceeding in the whole five acres. . . ."

By s. 4 words and expressions to which meanings are assigned in the Public Health Acts have in this Act the same meanings.

May 1, 4. *Sir E. Clarke Q.C.* and *Cozens-Hardy Q.C.* (*Upjohn* with them) for the appellants. The Pantiles are a " street " repairable by the inhabitants at large. In s. 4 of the Public Health Act 1875 a street is defined to include any highway, not being a turnpike road. By s. 149 " all streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements stones and other materials thereof, and all buildings

(1) [1894] 2 Q. B. 867.

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implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority." This has the effect of vesting the subsoil in the urban authority, in whom also by s. 13 sewers are vested, and who by s. 39 have power to make and maintain public conveniences in proper situations. More extensive powers are given by the Tunbridge Wells Improvement Act 1890 ss. 93, 284, for the erection of lavatories and places of convenience, and the appellants are justified by these powers as well as by those conferred by the Public Health Act. The decided cases, though not so explicit as might be, support the appellants' contention. In *Coverdale* v. *Charlton* (1) Bramwell L.J., adopting the view of Willes J. in *Hinde* v. *Charlton* (2), said that the street vests in the local authority quâ street and defined a "street" as "a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." Brett and Cotton L.JJ. expressed the same view. See also *Rolls* v. *Vestry of St. George the Martyr, Southwark*, per James L.J. (3) The definitions of "vestry" and of "street" given by Bramwell L.J. in *Coverdale* v. *Charlton* (1) were also accepted in *Wandsworth Board of Works* v. *United Telephone Co.* (4) Even if the vesting of the "street" does not give the power, the words "public place, or land belonging to them" in s. 93, and the words "under their control" in s. 284 of the local Act are large enough for the purpose.

[They also cited *Pickering* v. *Rudd.* (5)]

Moulton Q.C. Asquith Q.C. and *Crawford Munro* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, in this case it appears to me that the matter may be decided without reference to some of the very wide considerations that have been imported into the

(1) 4 Q. B. D. 104.
(2) L. R. 2 C. P. 104, 116.
(3) 14 Ch. D. 785, 795, 796.
(4) 13 Q. B. D. 904; see p. 925, per Fry L.J.
(5) 4 Camp. 219.

case. The sole question here is whether these erections, such as they are, have been placed as they have been placed by the authority of the local board under any justification either of property or by statutory provision.

Now, first, as to the property, it cannot be denied that at one time the land in which these erections have been placed belonged to the predecessors in title of the plaintiffs. That has not been denied, and cannot be denied from the state of the title.

The next question that arises is, assuming that the property was once the property of the plaintiffs, has it been altered by any legislation which has taken place since? My Lords, I really am hardly able to follow the reasoning which suggests that a right of property in the subsoil, to the extent and degree to which it has here been taken possession of, has passed under any Act of Parliament whatever. Whatever may be the true construction of the word "street"—and many observations might be made about the mode in which the word "street" is defined—it appears to me that in no sense have these structures been placed in the "street." The word certainly would be very inappropriate in ordinary parlance to describe a subterranean excavation made with the conveniences described. My Lords, for my own part, I am disposed to adopt every word of what James L.J. said in the passage that has been quoted as to the true effect and meaning of the vesting of a "street" in a local body. That the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as James L.J. points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and, therefore, there was given to them an actual property in the street and in the materials thereof. The same section that vests the street in them vests also the materials, the actual personal property provided for the purpose of repair, and so forth. It is intelligible enough that Parliament should

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have vested the street quâ street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street.

But the provisions with respect to the subsoil are totally different. In the first place, it lies plainly before one that if the complete vesting of the whole of the property in the land over which the public had rights or duties of repair were intended to be given, there would be no reason in the world why the Legislature should not have said so, whereas it has carefully guarded apparently, in the various Acts of Parliament to which reference has been made, against any suggestion that it ever was intended to convey the land over which the public right existed in the sense in which it would be conveyed to an ordinary private proprietor if you were conveying a piece of land.

My Lords, the only observation I have heard which is really capable of plausible statement to the contrary is that a special Act of Parliament was passed in order to protect the rights of the owners of mines and minerals. Now, my Lords, I cannot help thinking that pointing to an Act of Parliament which was passed to quiet doubts and fears as to what might have been the effect of such legislation is a very weak argument to shew that Parliament ever supposed that it had given the soil of the freehold in the case of lands over which public rights existed; and, indeed, if that argument is pressed to its conclusion, namely, that the object and intention of the Acts was to convey the land down to the centre of the earth, it is remarkable that almost every judge who has ever touched this question has repudiated the notion that any such effect ever could have been given to the Acts. Fry L.J. says he thinks it might have been the safer view if that had been adopted. (1) Whether his Lordship means the safer view in a court or the safer view to be taken by the Legislature, so as to make it plain to be their intention that the soil should pass, I do not know.

My Lords, it seems to me that when one turns to the Act under which the justification is sought —the Tunbridge Wells Improvement Act, 1890—it is a very remarkable thing that the 93rd section, which gives these additional powers which are

(1) 13 Q. B. D. at p. 925.

now sought to be insisted upon, appears to draw a distinction in the plainest possible way. There are three things dealt with: "The corporation may erect and maintain, or permit to be erected and maintained," one of these structures "in any street or public place"—that is No. 1; No. 2 is "or on land belonging to them" (by the hypothesis this land does belong to them, therefore they do not require No. 2 at all, if that is the true construction of it); No. 3 is "or on land belonging to any person with the consent of the owner, &c." I really fail to see how on the ordinary construction of statutes one can suppose that where an Act of Parliament has given such powers as in this Act it has given, and has carefully guarded by the language which it has used against such a construction as is insisted upon, it is arguable.

In giving judgment in *Coverdale* v. *Charlton* (1) Lord Bramwell is reported to have said that it would be a reasonable construction of the statute to suppose, not that the soil of the freehold had been given in the sense which I have described, but only so much that the street should be used as a street; and then his Lordship is also credited with the observation that the local authority would have authority to do such things as are commonly done in or under a street. My Lords, I think if his Lordship did use those words he could not have had in his mind such a question as is now before your Lordships, because, if so, it would really be inconsistent with the rest of his judgment. "What is commonly done in a street" may include water-pipes and gas-pipes as well as sewers, and it could not be supposed that any such power was intended to be conveyed by such language. I think what his Lordship must have meant was such things as are usually done in a street for the purpose, as he elsewhere in his judgment describes it, of maintaining it as a street, and which are incident to the maintenance and repair of the street as a street. For that purpose it would be intelligible. For any other purpose it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued of not taking private rights without

(1) 4 Q. B. D. at pp. 116, 118.

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compensation. In circumstances in which it is essential to take private property Parliament has always provided for compensation, and in this section the language itself imports that where private property is being dealt with it can only be done "with the consent of the owner."

For these reasons, I think this matter is susceptible of very short treatment. I decline altogether to enter into the question whether this is a "public place" repairable by the public, and whether, therefore, the foundation of Sir Edward Clarke's whole contention exists or not, because it appears to me, assuming only for the purpose of the argument that it is a "public place"—I do not say it is, but assuming for the purpose of argument that it is, and that it is repairable—nevertheless the construction sought to be placed upon these various sections is entirely unwarrantable, and therefore this appeal must be dismissed with costs. I move your Lordships accordingly.

LORD HERSCHELL. My Lords, I am very clearly of the same opinion. The building, the erection of which is complained of by the plaintiffs in this action, is in soil primâ facie belonging to them. The defendants seek to justify what they have done by reference to two Acts of Parliament. In the first place, they contend that the surface below which this building has been erected is a street repairable by the inhabitants, and has therefore been vested in them as the urban authority under the provisions of the Public Health Act. They contend that, being thus vested in them, there was transferred to them by such vesting all the soil beneath the surface of the street to such a depth as would cover all ordinary uses made by a public authority of soil below a street, that this was sufficient to transfer to them the soil within which they had made this convenience, and consequently they were justified in what they had done. My Lords, I will assume, for the purpose of my judgment, that this was a highway repairable by the inhabitants at large within this urban district, and that in consequence of this the street and the pavement stones and other materials thereof vested in the urban authority. The learned counsel for the

appellants have contended that it has been established by decision that if a street has so vested the soil below the street, at all events to the depth necessary for the construction of sewers, has vested in the urban authority, and that they have not gone below that depth.

The case relied on, and the only case I think which can be called a decision, although I do not think that word is accurate even as regards that case, is *Coverdale* v. *Charlton*. (1) All that had to be determined in that case was whether the vesting of a street gave the urban authority power to let the pasturage on the surface : it was not necessary to decide anything more than that. If sufficient property vested for that purpose, then there was a good demise on the part of the urban authority. But no doubt the opinion was expressed there that the vesting of the street would carry something more than the mere surface, and that in addition to what was necessary for its maintenance as a highway there would be transferred to the urban authority soil below that sufficient for all the ordinary uses of land below a highway. My Lords, I confess I see considerable difficulty in accepting any such view. In the first place, the language of the enactment seems to me to point in the contrary direction. Sect. 149 vests "all streets" being or becoming highways repairable by the inhabitants at large "and the pavements stones, and other materials thereof." All that seems to point to the surface use of the street as a highway and nothing more, and I am unable to see why it should be supposed to transfer to and vest in the urban authority the subsoil below for sewerage purposes, because that is provided for, and amply provided for, by other provisions in the same statute. By s. 13 "all existing and future sewers" are "vested in" and placed "under the control" of the local authority in precisely the same language as the streets are in the section now under consideration. What necessity, therefore, is there for transferring, by a clause vesting the streets, the soil under the streets in which the sewers are, when the sewers themselves are, with certain exceptions which it is unnecessary to go into, vested in the local authority? Not only so, but by s. 16 "any local authority may

(1) 4 Q. B. D. 104.

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carry any sewer through, across, or under any turnpike road or any street or place laid out as, or intended for, a street." So that express power is given to carry sewers under streets. Where, then, is the necessity for vesting in them the soil under streets for the purpose of enabling them to place sewers there?

My Lords, it seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use. I am therefore of opinion that the section of the Public Health Act gave no authority for the acts which are complained of; and even if it could be established that the soil was conveyed so far as was necessary for sewerage purposes, I do not think it would follow that the defendants would be any more justified in what they have done.

But then it is said that Tunbridge Wells is regulated in this matter by another statute, namely, the Act of 1890, which empowers the corporation to "erect and maintain in any street or public place, or on land belonging to them or on land belonging to any person with the consent of the owner," "water-closets, urinals, and lavatories." I do not think that the enactment I have just read gave the corporation any power to erect and maintain a water-closet, a urinal, or a lavatory on land under the street which was the property of a private owner and did not belong to them.

For these reasons, my Lords, I think the appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and I will only add that I think the meaning of s. 149 of the Public Health Act 1875 is to give the urban sanitary authority the control and management of streets coming within the description therein contained, and such statutory right in the nature of a right of property as may be sufficient to authorize them to sue and be sued as occasion may require in the course of such control and management.

With regard to the later Act, the Tunbridge Wells Act, I must say that I do not think that the place where the corpora-

tion have constructed this underground chamber is land under their control.

LORD MORRIS. My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 4, 1896.

Solicitors for appellants: *Sole, Turner & Knight.*
Solicitors for respondents: *Burn & Berridge.*

[HOUSE OF LORDS.]

THE ASSESSMENT COMMITTEE OF THE WEST HAM UNION, ESSEX } APPELLANTS;

AND

THE JUSTICES OF ESSEX AND THE LONDON COUNTY COUNCIL } RESPONDENTS.

(*Ex parte* AS TO JUSTICES OF ESSEX.)

Poor-rate—Appeal—Consent of Guardians—Assessment Committee as Respondents—Costs—Union Assessment Committee Amendment Act 1864 *c.* 39 *s.* 2.

Where the assessment committee of a union receive notice of a poor-rate appeal under s. 1 of the Union Assessment Committee Amendment Act 1864, they have no authority to appear as respondents to the appeal unless they obtain the consent of the guardians after sending notice to every guardian, as required by s. 2. If they do appear without such consent and the appeal is dismissed "with costs to the respondents" they are not entitled to costs, although throughout the proceedings they receive notices to attend from the appellants and are treated by them as respondents.

The decision of the Court of Appeal ([1895] 1 Q. B. 38) affirmed.

THE London County Council appealed against eleven poor-rates made in 1890, 1891, 1892 and 1893, some for the parish of East Ham, and the others for the parish of West Ham. In each of these appeals the London County Council gave notice

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of the appeal (as required by the Union Assessment Committee Amendment Act 1864 s. 1) to the assessment committee of the West Ham Union in which the parishes are situate. One of the appeals, that made on May 1, 1891, for the parish of West Ham, was dismissed by the court of quarter sessions subject to a special case for the opinion of the High Court. The special case ultimately came before this House. (1) Upon the argument of the special case in the Queen's Bench Division and in the Court of Appeal the assessment committee appeared as respondents, together with the churchwardens and overseers of the poor of the parish of West Ham who were respondents in all the appeals.

All the appeals were from time to time upon the application of the London County Council respited till the quarter sessions held on October 18, 1893. Upon each application for the respite the assessment committee appeared by counsel in response to notices sent to them by the London County Council and consented to the respite. At the court of quarter sessions held on October 18, 1893, all the eleven appeals were dismissed by consent, "with costs to the respondents to be taxed out of sessions." Throughout the proceedings the London County Council in their notices to and their correspondence with the assessment committee treated them as respondents. The assessment committee alleged that they had under s. 2 of the Act obtained the consent of the guardians to their appearing as respondents, and applied to the clerk of the peace to tax their costs in accordance with the above order of October 18, 1893. The clerk of the peace taxed the costs of the churchwardens and overseers of West Ham, but declined to tax the costs of the assessment committee on the ground that no evidence had been given that the consent of the guardians had been obtained as required by the Act. The assessment committee then applied for a rule nisi for a mandamus commanding the justices of Essex to order the clerk of the peace to tax the costs of the assessment committee in pursuance of the order of quarter sessions of October 18, 1893. After argument the rule was discharged by the Queen's Bench Division, and this decision

(1) [1893] A. C. 562.

was affirmed by the Court of Appeal. (1) Against these decisions the present appeal was brought.

By s. 1 of the Union Assessment Committee Amendment Act 1864 (c. 39), before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing of the intention to appeal and the grounds thereof to the assessment committee of such union.

By s. 2, "The assessment committee of such union may with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union, in like manner, and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given."

May 4, 7. *Jelf Q.C.* and *E. Morten* for the appellants. The appellants are entitled to their costs as respondents before the quarter sessions, having been recognised as respondents and so treated throughout the whole proceedings. It was not open to the county council, after having acquiesced in the appellants' appearance at quarter sessions as respondents, to rely on the non-fulfilment of the statutory condition. The appellants had an implied authority to appear which was recognised and acted upon by the other parties to the proceedings at quarter sessions. The objection to appearance must always be raised as a preliminary question. Under s. 1 of the Union Assessment Committee Amendment Act 1864 (c. 39), it was held in *Reg.* v. *Denbighshire Justices* (2) that a second appeal may be made against a poor-rate without repeating the application to the committee for relief. The London County Council has throughout waived the objection which is now raised. It appears that when the orders of October 18, 1893 were formally drawn up they were so drawn as to exclude the costs of the assessment committee: but this was not right. The London County

(1) [1895] 1 Q. B. 38. (2) 15 Q. B. D. 451.

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Council were not entitled to go behind the consent orders made at the quarter sessions. Those orders were final and irrevocable, and could not be set aside or affected by subsequent Courts. It was held in *Reg.* v. *Staffordshire Justices* (1) that subsequent sessions had no jurisdiction to deal with an order made by the prior sessions; and see *Rex* v. *Higgins* (2) and *Rex* v. *Hertfordshire Justices.* (3) It is not now, at the last moment, open to the London County Council to withdraw their waiver of the non-compliance with the conditions of the section.

Bosanquet Q.C. and *Wedderburn* for the London County Council were not heard.

LORD HALSBURY L.C. My Lords, it appears to me that this is an extremely plain case. The persons who have called themselves respondents in these appeals were not respondents, and they had no right to costs upon the judgment of quarter sessions that the appeals be dismissed with costs. How that happened and why it is that they were not in point of law respondents is, I think, very manifest. They were persons who had sought to fill the character of respondents, and the idea in their minds was (I suppose we may assume now) that, having taken the proper course in respect of one appeal, when for certain reasons that appeal was subsequently changed, and the proceedings made applicable to what had been done in another appeal, they then proceeded as if they were in truth respondents to the appeals when they had not got the authority which the Legislature has imposed as a condition precedent to their right to act as respondents upon any such appeal. That was, I think, a mistake on their part. They had no right to proceed without the authority of the guardians. They never did get their authority, and the result was that when the court of quarter sessions pronounced the judgment "that the appeal be dismissed with costs to the respondents," those persons who were not by law invested with the character of respondents, not having the authority of the guardians to appear, ought not to get their costs.

(1) 7 E. & B. 935. (2) 5 A. & E. 554.
(3) 4 B. & Ad. 561.

We have had a very long argument on a matter which seems to me to be a very short and plain one. The initial mistake made was a mistake that was made by those who now claim to have the costs. It is said that they were misled and induced to go on; and that the other side ought to have taken a preliminary objection to the whole course of the litigation. The answer, which I think is very manifest, is this: it would not be usual or proper to my mind, when persons put themselves forward as respondents, to inquire whether they have the authority which the statute has given them upon certain conditions. I should have thought it was natural when persons, at all events in the position of these attempted respondents, were assuming to themselves a character which the Legislature has given them as respondents with the consent of the guardians, that it should be assumed on the other side that they were respondents, and that it would be considered to be a somewhat insolent demand to say, "Have you the proper authority to proceed in this way before we can deal with you?" Two respectable solicitors corresponding with each other for their respective clients might, I think, well be credited with the opinion that the other side would not have intervened in the matter unless they had the proper authority. I do not mean to suggest there was any endeavour to suppress the truth originally by the present appellants. On the contrary, I have no doubt that they made a bonâ fide blunder, and thought that that which they had done would entitle them to go on without fresh consents by the guardians. I assume that in their favour. But why in the world should not the other side have assumed that they had done all that was necessary to be done? They believed it themselves; why am I to suppose the London County Council did not also believe (without inquiring into it) that they had done all that was necessary?

Then comes the question, What is to be done when the appeals are dismissed by the quarter sessions in the ordinary form? The appeal is dismissed with costs. No question is asked, because they had all been acting upon an erroneous hypothesis that the assessment committee were properly respondents, but when the costs came to be taxed the question

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arose, "Who are the respondents?" I can quite understand how the question came to be more narrowly inquired into because there were two sets of respondents, and then the question arose whether the quarter sessions had intended that both these sets of respondents should get costs. It came out then—one can see why—that these so-called respondents had not originally the authority of the guardians at all. Then the clerk of the peace said, and very properly, "I do not think I ought to tax the costs of anybody who is not a respondent. Are you respondents? Shew me any authority that you had to appear on behalf of the guardians as respondents." Then a little fencing takes place; one can pretty well see how it was. They had the authority, or supposed they had the authority, which justified their appearing as respondents in one appeal; but when the objection was taken, "Now shew us the authority you have to appear as respondents upon every one of these appeals," they do not disclose the fact. They knew very well that if the authority was disclosed it would appear that it was only authority to appear on one of the appeals. They say, "No, you have no right to ask for all this; therefore we will not shew you any authority at all." The result has been, that whereas if they had disclosed the authority it is extremely probable that they would at least have recovered the costs of one appeal for which they had, as it is now said, the proper authority, their refusal to disclose that made the clerk of the peace, acting upon the maxim "De non apparentibus et non existentibus eadem est ratio," refuse, and very properly, to give them costs altogether. That seems to me to be absolutely right.

Notwithstanding the length of time which this case has occupied, it really comes back to this point. Had they or had they not the authority to act as respondents, and, if they had, did they prove it? Certainly they did not prove it. Therefore, according to the maxim I have quoted already, they are not entitled to insist that they were legally respondents, and as such entitled to receive their costs. Consequently it is manifest that this appeal must be dismissed with costs.

My Lords, something has been said about the extra costs

which have been inflicted upon the losing party by some printing in the appeal cases in this book. As to that, all I would say is this, that it would be right, I think, to call the special attention of the taxing officer to the nature of the evidence and the documents printed in this book. Your Lordships can form no judgment upon it at present; but undoubtedly if, wantonly and unnecessarily, costs have been incurred in the printing of the appeal cases in this book, that matter ought to be considered by the taxing officer, and no doubt it will be. At present, however, all we have to do is to deal with this appeal, and I move your Lordships that it be dismissed with costs.

LORD HERSCHELL. My Lords, I am of the same opinion. I think when the order of the court of quarter sessions was made that the appeals be dismissed with costs, that order gave a right to costs to all who were lawfully constituted respondent upon those appeals, and to no one else. The mere fact that a party had appeared as respondent, if not a lawfully constituted respondent, would not give a right to costs under that order. Now by statute the assessment committee were only entitled to appear as respondents if they had served notice on every guardian and got the consent of the guardians to do so. That condition had not been complied with in the present case; they were, therefore, not entitled to appear as respondents. When that fact became disclosed to the clerk of the peace, it appears to me he was perfectly justified in saying, "I cannot tax these costs, because I regard the order of the quarter sessions as directing me to tax the respondents' costs, and it now appears that you are not respondents."

My Lords, I should like to add this observation: I do not consider these notices and the consent obtained after notice as by any means a mere formality. I do not think it was so intended by the Legislature. It seems to me that in the case of each appeal, when the guardians receive such a notice, it is for them to consider whether the appearance of the assessment committee as respondents is really advantageous and desirable or not. If they think it is so, no doubt they will give their

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consent; but it ought not to be treated as a mere matter of form, but as a matter on which the guardians should exercise their judgment.

I therefore concur in thinking that this appeal should be dismissed with costs.

LORD DAVEY. My Lords, I entirely concur in the reasons which your Lordships have given. In my opinion, this is a perfectly idle appeal, and ought to be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 7, 1896.

Solicitor for appellants: *F. E. Hilleary.*
Solicitor for respondents: *W. A. Blaxland.*

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H. L. (E.) 1896 *May* 11.

SADLER . . . . . APPELLANT;

AND

THE GREAT WESTERN RAILWAY COMPANY . . . . . RESPONDENTS.

Practice—Parties—Defendants, Joinder of—Separate Causes of Action—Claim for Damages—Injunction—Order XVI. r 4.

Claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one action.

In an action against two defendants the statement of claim alleged that each of the defendants by their several acts, and that the defendants by their combined acts, obstructed the plaintiff's access to his premises, and claimed damages against them and each of them and an injunction:—

Held, that the action could not be maintained in this form and that one of the defendants must be struck out.

The decision of the Court of Appeal ([1895] 2 Q. B. 688) affirmed.

Quære whether the action could have been maintained if an injunction only had been claimed.

THE appellant brought an action against the respondents and the Midland Railway Company, and alleged in the statement of claim (paragraphs 1–4) that he occupied the premises

268, Strand, London, and there sold things required by cyclists and athletes and stored and repaired cycles; that the Great Western Railway Company occupied the premises 269, Strand, immediately adjoining the appellant's premises on the north, and that the Midland Railway Company occupied 267, Strand, immediately adjoining his premises on the south, using their respective premises as railway parcel-offices; that in carrying on these businesses each of the companies caused many carts and vans to assemble for long periods on the public highway in front of the appellant's premises, obstructing the highway and footway and causing inconvenience and peril to the public, and a special inconvenience and annoyance to the appellant as occupier of his premises, to which access was thus unreasonably obstructed.

Paragraph 5 was as follows: Further, each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in manner aforesaid at the same time, while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid, and by their respective *combined* acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle, and also cause special inconvenience and peril to the plaintiff and his servants and customers on the footway.

The appellant claimed—(1.) 5000*l.* damages; (2.) the like sum from each of the defendant companies; and (3.) an injunction to restrain them and each of them from continuing the acts complained of.

Upon a summons taken out by the Great Western Railway Company, Day J. affirmed a master's order to stay the action unless the plaintiff amended by striking out the Midland Railway Company as defendants. This decision was affirmed by the Court of Appeal, A. L. Smith L.J. being in favour of the order below, and Rigby L.J. against it. (1) The plaintiff brought this appeal.

May 8, 11. *Warmington Q.C.* and *Chester Jones* (*Russell*

(1) [1895] 2 Q. B. 688.

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Roberts with them) for the appellant. Where the combined action of two or more persons creates a nuisance, both or all are liable. The action of each separately might be insufficient to sustain an action; and if several defendants in such a case could not be joined, grave injustice might be done. An injunction is claimed as well as damages; and thus the case is exactly within *Thorpe* v. *Brumfitt* (1), where an injunction was granted against several persons whose acts together constituted a nuisance, though the damage occasioned by the acts of any one taken alone would have been inappreciable. This principle was adopted by Chitty J. in *Lambton* v. *Mellish, Lambton* v. *Cox*. (2) An action such as the present might have been maintained in Chancery under Lord Cairns' Act. Commoners, for example, might bring an action against several lords of different manors for infringement of their rights. In breaches of trust, trustees and representatives of deceased trustees might be joined as co-defendants.

[LORD WATSON referred to *Cowan* v. *Duke of Buccleuch*. (3)]

Smurthwaite v. *Hannay* (4) and *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* (5) are distinguishable as being cases of the illegitimate joinder of plaintiffs who each had a separate and distinct cause of action. The case is provided for by Order XVI. rr. 1, 4 and 7. Even if the claim be excessive, the action will not necessarily be dismissed, and under rule 11 of the same order an amendment may be made.

Asquith Q.C. and the *Hon. A. Lyttelton* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, I really think this case is too plain for argument, notwithstanding the period it has lasted.

Rigby L.J., who differed from A. L. Smith L.J. as to the effect of the pleadings, said (6): "I do not look upon this case as one where the liability of the defendants is separate. No doubt the plaintiff in his statement of claim alleges a separate case against each of the defendants; but in clause 5 he alleges what may be a much more formidable case—that the concurrent

(1) L. R. 8 Ch. 650.
(2) [1894] 3 Ch. 163.
(3) 2 App. Cas. 344.
(4) [1894] A. C. 494.
(5) [1895] A. C. 661.
(6) [1895] 2 Q. B., at p. 696.

action of the two defendants creates a nuisance. If, therefore, my judgment had to decide this matter, I should differ from the learned judge." My Lords, if I agreed with the learned Lord Justice in the proposition which he states, I am not certain that I should disagree with him in the conclusion; but I think the whole fallacy is involved in his proposition. The pleader here has thought proper in some parts of the statement of claim to allege several and separate causes of action. He has set out in terms that the plaintiff has a separate cause of action against each of the two defendants. I believe the true construction of the whole statement of claim is *that*, and that the words which are to be found in the fifth paragraph do no more than expand, with a view to damages, what is referred to in the other paragraphs of the statement of claim. But if it were true that the fifth paragraph sets out a joint cause of action, which I do not think it does, that would not make the case any the better for the plaintiff, because upon that hypothesis he would have joined several causes of action in one count with a joint cause of action in another count which would be equally objectionable; and therefore the consequences of such a procedure would not be evaded. It seems to me after the decision in your Lordships' House placing the construction upon the order before us which alone could have given colour to such a contention, it is no longer possible to entertain any such contention. The order does no more than deal with the joinder of the parties; it has no reference to the joinder of the causes of action.

With regard to Rigby L.J.'s observation about not knowing "what a common law action is at the present day," in one sense I can understand what his Lordship means. There are two branches of our judicial system; the Court in each branch has now full jurisdiction over every cause; it used to be under separate jurisdictions; but I am not aware that the Judicature Act or any principle that has ever been acted upon or affirmed in any court has said that you may confuse several separate and distinct causes of action. What we used to know as a common law cause of action, and what *is* a common law cause of action, must still remain so, and as such is open to the incidents of a cause of action so as to prevent that which is a

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separate cause of action being made a joint cause of action. The whole point here is this. The pleader having set out the separate causes of action, which he has carefully and accurately described as separate causes of action, how can he combine these separate causes of action so as to bring one action against two defendants in respect of their several liability on separate causes of action? It seems to me that it is impossible to maintain such a proposition.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD WATSON. My Lords, I take the same view. It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate defendants. I do not think that upon any fair construction of his pleadings there is set forth any joint claim against the defendants. In these circumstances it has been painfully apparent from first to last of the learned argument we have heard that the contention of the appellant is not only unsupported by authority, but is in the teeth of authority.

LORD HERSCHELL. My Lords, I am of the same opinion. It is practically admitted, for it cannot be disputed, that there are in the statement of claim two separate causes of action charged against these two defendants—that either of them might be sued alone, and that the plaintiffs here might recover against either of them alone. It is an action in which there is a claim for damages, first jointly, and then against each of them, as well as a claim for an injunction.

My Lords, it is quite unnecessary to express any opinion as to what might have been the case if the claim had been limited to a claim for a declaration of right or a claim to an injunction. I must not be taken to be expressing any opinion that in that case the action in its present form could have proceeded; I do not express any opinion upon it at all. In the present case there is not only a claim for an injunction, but a claim for damages against each of two several defendants. An action of this description could only have been maintained in the common law courts before the Judicature Act; and when it is said that

there is no authority, it must be observed that nobody would ever have dreamt of joining in the same action two defendants against whom he made separate claims for damages. In my judgment there is no pretence for joining them now merely because you also claim an injunction, even in a case where, if your claim had been only for an injunction, a joinder might have been allowed.

For these reasons, my Lords, I think the appeal should be dismissed.

LORD SHAND. My Lords, as something has been said in this case about the rules of practice that are observed in Scotland, I should like to say that I think there is very little substantial difference, but that in some respects, as it appears to me, there is a favourable difference in the law of that country with regard to proceedings of this kind. I give no opinion as to whether this would or would not have been a competent proceeding in Scotland further than to say that certainly if it were a case of interdict only I should have thought that the parties could, under the dictum in the *Duke of Buccleuch's Case* (1), have had the whole case tried as one. Whether or not it would have been different upon a claim for damages, having regard to what fell from Earl Cairns, is another question. For my own part I think, even in a case of damages where there are only two defendants concerned, it might be convenient to have the cases of damages tried together.

But the rules and practice of England seem to be clear, and I think there has been no precedent cited for what is here proposed. I agree in thinking that these grounds of action are not only separable but separate—that each of the defendants is called upon to answer for his own acts, and for his own acts only. I think, looking to what has been decided in the previous cases, and what appears to be the practice in England, the majority of the learned judges in this case have come to the right result according to the law of England.

LORD DAVEY. My Lords, I quite agree, and I have very little to add to the reasons which have been given by your Lordships.

(1) 2 App. Cas. 344.

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I only desire to say, as we are differing from the view taken by Rigby L.J., that I think we differ from that learned judge not so much in the view of the law as in the view we take of the effect of the allegations in the statement of claim. What the learned judge says is this: "It appears to me if it is made out to be a nuisance" (that is to say, if what is stated in the fifth paragraph is made out to be a nuisance) "not two nuisances but one," and he repeats that line of reasoning when commenting upon the case of *Smurthwaite* v. *Hannay*. (1) He says that as he understands it the effect of that decision stated shortly is "that you cannot bring plaintiffs, and by parity of reasoning you cannot bring defendants, before the Court where the causes of action vested in the different plaintiffs or the causes of action that exist against the different defendants are separate. I do not look upon this case as one where the liability of the defendants is separate."

Now, my Lords, I believe there is not a scintilla of allegation nor was it intended, as the appellant's counsel fairly said, to state in the statement of claim that there was anything else than a separate cause of action—that there was anything like a joint cause of action or a joint action of any kind on the part of the defendants. My Lords, my present impression is that even if the plaintiff had confined his case to an injunction he could not have maintained his action; but I do not desire to express a decided opinion upon that point, and it is not necessary to do so, because this action is avowedly maintained as a common law action, as I venture to call it, notwithstanding Rigby L.J.'s criticism—a common law action for damages. The plaintiff, though invited to do so, declines, as I understand it, to limit it to an injunction.

I agree in thinking that the appeal should be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 11, 1896.

Solicitors for appellant: *Kennedy, Hughes & Kennedy.*
Solicitor for respondents: *R. R. Nelson.*

(1) [1894] A. C. 494.

[HOUSE OF LORDS.]

SIR W. J. R. COTTON, KNIGHT (CHAMBERLAIN OF THE CITY OF LONDON) . . . } APPELLANT;

AND

VOGAN & CO. . . . . RESPONDENTS.

H. L. (E.) 1896 May 19.

London, City of—Grain Duty—"Grain brought into the Port of London for Sale"—Manufacture of Grain into other Articles—Metage on Grain (Port of London) Act 1872 (*c. c.*) *s.* 4.

The Metage on Grain (Port of London) Act 1872 (c. c.) s. 4, which entitles the corporation of London to a duty "in respect of all grain brought into the port of London for sale," applies only to grain brought in for sale as grain, and not to grain brought in to be ground into meal, or manufactured into other articles of commerce, and then sold.

The decision of the Court of Appeal ([1895] 2 Q. B. 652) affirmed.

BY the Metage on Grain (Port of London) Act 1872 (c. c.) s. 4, from and after October 31, 1872, and for thirty years thereafter, the corporation may demand and receive "in respect of all grain brought into the port of London for sale a duty" at the rate of three-sixteenths of a penny per hundredweight, to be called the City of London Grain Duty, and such duty shall, subject to the provisions of this Act, be held by the corporation for the preservation of open spaces in the neighbourhood of London, not within the metropolis as defined by the Metropolis Management Act 1855.

By s. 2 "grain" means corn, pulse, and seeds, except the following seeds when brought into the port of London in sacks or bags; (that is to say) linseed, rapeseed, millet seed, canary seed, cotton seed, poppy seed, teel seed, niger seed, gingetty seed, and sesame seed.

Under this Act the appellants on behalf of the corporation sued the respondents in the Mayor's Court, London, for duty on maize and oats brought into the port of London by the respondents. The jury found a special verdict, of which the parts material to this report are as follows:—

The maize and oats in question were discharged from the

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steamers and taken to the respondents' mills. There part of the maize was ground into meal between rollers and then sold by the respondents in that condition. The remainder of the maize was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked maize from the meal resulting from such crushing and cracking. The meal was then sold separately. The crushed and cracked maize was then mixed in certain proportions with beans, peas, and oats, which had been similarly treated, and when so mixed was sold for horse food. The oats discharged from the steamers were first washed, and then laid out to dry, and then sifted so as to get rid of the dirt which accompanied them, then crushed between rollers, then sifted so as to separate the crushed oats from the meal and chaff which resulted from such crushing, and then mixed in certain proportions with beans, peas, and maize, which had been similarly treated, and when so mixed were then sold as horse food. The maize and oats were brought into the port of London by the respondents for the purpose of being dealt with and sold as above described.

Judgment was given in the Mayor's Court for the defendants on the authority of *Scott* v. *Taylor* (1), and the plaintiffs' appeal was dismissed by the Court of Appeal (Lord Esher M.R., Kay and Rigby L.JJ.) with costs. (2)

Sir E. Clarke Q.C. and *Danckwerts* for the appellant. The words "brought into port for sale" do not necessarily mean brought into port for sale as grain. The construction put by the Court below reads in words such as "in the same state as on arrival." All grain imported and sold must pay the duty which is levied at the moment of importation. It is enough that the substance was brought in and subsequently sold; and notwithstanding the operations which it undergoes it is throughout virtually the same—a mere mechanical operation, but no chemical change is effected. In *Attorney-General* v. *Green* (3) a duty imposed by 43 Geo. 3, c. 69 on vinegar "brewed or made in Great Britain for sale" was held payable, though

(1) 48 J. P. 424. (2) [1895] 2 Q. B. 652.

(3) 4 Price, 224.

the vinegar was used to make blacking. In *Pharmaceutical Society* v. *Armson* (1) and *Pharmaceutical Society* v. *Piper* (2) penalties were imposed for selling poisons in a compound substance. The present as compared with these is an a fortiori case.

Joseph Walton Q.C. and *Albert Gray* for the respondents were not heard.

LORD HERSCHELL (after stating the facts). My Lords, the respondents are liable to duty in respect of the maize and oats if it was "grain brought into the port of London for sale." Undoubtedly it was "grain brought into the port of London." It is found by the special verdict that it was brought in for the purpose for which it was used. Keeping that in view, was it brought in for sale? No doubt if what was sold was "grain" then it would be impossible to resist the conclusion that it was brought in for sale; but if what was sold was not within the definition of "grain," then it appears to me that, as it was brought in in order that it might be so dealt with and that the resulting product might be sold, if that resulting product was not grain but something else, the grain was not brought in to be sold.

It is said that this construction necessitates the insertion of words into the statute—that you have to introduce these words, "grain brought in to be sold as grain." No doubt the effect is the same as if those words were there; but it is not necessary to introduce any such words. The result arises from the language used. Sir Edward Clarke, who argued in the first instance for the appellant, admitted that if it had been brought into this country in the form in which (treating it as the same thing for the moment) it was sold, it would not have been "grain" within the Act. Then, if so, if the thing sold was not "grain" within the meaning of the Act, and if the grain imported was imported for the purpose of being turned into that thing which was ex hypothesi not grain, and if that thing which was not "grain" within the meaning of the Act was the only thing to be sold, how can it be said that the grain was imported for

(1) [1894] 2 Q. B. 720. (2) [1893] 1 Q. B. 686.

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the purpose of being sold? It seems to me that when once the admission is made that the thing sold was not "grain" within the meaning of this statute the case is at an end.

Mr. Danckwerts half argued that the thing sold might come within the definition of "grain" contained in this statute; but I do not think that that contention is really a possible one. The Legislature was dealing with commercial matters in the City of London, with imports the nature of which was well known, and if it had intended to include what had been always regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different to that which is to be found in this statute. Therefore I think it is impossible to construe these words as including such products as those which were sold in the present case. I move your Lordships that the judgment of the Court below be affirmed with costs.

LORD WATSON. My Lords, I concur. The jury have found that the maize and oats were imported with the view of their being first subjected to a process of grinding or crushing and then sold. The result of that process was that the substances operated upon ceased to answer the statutory description of a dutiable article. In these circumstances I find it impossible to affirm that the grains were brought into the port of London for sale within the meaning of the statute. The only sale by the respondents' firm was of the articles manufactured by them which were not subject to duty.

LORD SHAND. My Lords, I am of the same opinion.

If it could have been shewn that flour or meal imported into this country could well be described as "grain," I think the result would have been different; but I do not think that that could be successfully maintained, and I assume that nothing of the kind was even attempted.

The words of the statute appear to me to imply that the article is to be sold substantially in the shape in which it is brought in, as grain, and I think that the contention of the

appellants could only have been successfully maintained if the statute had contained different words—words such as these, "grain imported for sale or for manufacture and for the sale of the article to be manufactured."

LORD DAVEY. My Lords, I am of the same opinion.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 19, 1896.

Solicitor for appellant: *The City Solicitor.*
Solicitors for respondents: *Wansey, Bowen & Co.*

[HOUSE OF LORDS.]

LOCK AND TROTMAN . . . . . APPELLANTS;

AND

THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY, LIMITED . . . . . RESPONDENTS.

Company—Shareholder—Payment of Shares in advance of Calls—Interest out of Capital—Companies Act 1862 (25 & 26 *Vict. c.* 89) *ss.* 14, 19, 38; *Table A, s.* 7.

The directors of a company limited by shares may receive payment from a shareholder of any amounts remaining unpaid on his shares, and may pay out of capital interest on sums so paid up in advance of calls, either under Table A of the Companies Act 1862 (if applicable), or under provisions to the same effect in the company's articles of association, provided they do so in good faith and in the honest exercise of the discretion confided to directors.

The decisions of Stirling J. and the Court of Appeal ([1896] 1 Ch. 397) affirmed.

Dale v. *Martin* (9 L. R. Ir. 498; 11 L. R. Ir. 371) approved.

THE respondent company was incorporated in June 1878 by registration under the Companies Act 1862 as a company limited by shares. The objects for which the company was established were (inter alia) the investment and loan of money

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at interest, on the security of real or other property in Queensland and elsewhere.

The company's issued capital consisted of 164,992 preferred ordinary shares of 1*l.* 10*s.* each, fully paid or fully called up, and 164,992 ordinary shares of 7*l.* each, on which the sum of 1*l.* per share only had been called up. The articles of association contained the following provisions material to this appeal:—

"Art. 2: The articles contained in Table A of the Companies Act 1862 shall not apply . . . ."

"Art. 40: The board shall be at liberty from time to time as they think fit to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him, upon such terms in all respects as the board may determine."

"Art. 150: All dividends on shares shall be declared by general meetings. No dividend shall be made except out of the net profits of the company, either for the year or remaining over from previous years in some reserve fund or otherwise, but the directors may, if they see fit so to do, pay out of the capital of the company interest on sums paid up on shares in advance of calls."

"Art. 154: If a larger amount be paid up on some shares than on others of the same class, the dividend on the shares of that class shall be paid in proportion to the amount paid up on each share, except in so far as all or some part of the excess shall have been received by the board on the terms of paying interest thereon, in which case the part bearing interest shall not be reckoned for the purposes of dividend.

"Art. 155: All dividends whether upon account or otherwise, and all interest thereon (if any), shall belong and be payable to the shareholders who shall be upon the register of members on the day the resolution declaring such dividend shall be passed, or when the said interest shall become payable, without reference to whether they shall have been or shall be the holders of their shares at any other time whatever."

"Art. 158: Unpaid dividends and interest on shares shall never bear interest as against the company."

In November 1891 the directors were of opinion that

would be expedient that money should be raised for the purpose of discharging certain terminable debentures issued by the company to a large amount, which would become payable at various dates during 1892 and 1893, and they decided that the best mode in the interests of the company of raising the amount required would be by accepting payment in advance of calls from each shareholder willing to come into the scheme, upon terms that the company should pay interest at the rate of 6 per cent. per annum on the amount paid in advance of calls. A circular explaining the scheme was sent out to all the shareholders. In response to and on the terms of such circular the holders of 20,000 shares paid to the company in advance of calls the full amount uncalled thereon, namely, 6*l.* per share, and the company contracted with each shareholder to pay to him interest at the rate of 6 per cent. per annum on the amount so paid by him in advance of calls.

The whole amount received from the shareholders in advance of calls as aforesaid was in fact applied in redemption of terminable debentures of the company, and the appellants admitted that the directors of the company acted in the transaction in all respects in good faith.

The company duly paid the interest accruing due in respect of the amounts so paid by shareholders in advance of calls up to June 30, 1895. By the balance-sheet of the company for the year ending on that day, and by the report of the directors thereon, it appeared that the business for the year, after providing for the interest on debentures and the interest paid to shareholders as aforesaid, and other expenditure on revenue account, resulted in a loss of 11,061*l.* 14*s.* 2*d.*

The company had issued 453,900*l.* perpetual debentures and also terminable debentures, of which 244,556*l.* were outstanding. The appellant Lock was the holder of 500*l.* of perpetual debentures. The appellant Trotman was a holder of shares on which no payment in advance of calls had been made.

In December 1895 the appellants Lock, suing on behalf of himself and all other holders of debentures of the company, and Trotman, suing on behalf of himself and all other shareholders of the company other than the 20,000 ordinary shares prepaid

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in full in advance of calls, brought this action against the company, claiming an injunction to restrain the company from paying to shareholders who had prepaid their shares in full in advance of calls any interest on the amount prepaid, except out of the net profits of the company. Stirling J. refused a motion by the plaintiffs for an order restraining the company until the trial of the action, or further order, from paying to shareholders who had prepaid their shares in full in advance of calls any interest on the amount prepaid, except out of net profits. This decision was affirmed by the Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.); and the parties consenting that the hearing of the motion should be treated as the trial of the action, an order was made dismissing the action. (1)

June 18. *Millar Q.C.* and *E. Brodie Cooper* for the appellants. The payment of interest on money advanced in such circumstances as exist in the present case is not authorized by Table A or the 150th article, which in the present case is substituted for Table A. A long series of decisions shews that interest can only be paid on money lent in advance of calls out of funds which are applicable to the payment of profits. Outside creditors alone are entitled to be paid out of capital. In this case it is not really interest at all, but an illegal return of capital. The prepayment was not a loan but a payment of moneys which the shareholders were already under an obligation to pay. It was a mere device to avoid making a call. The relation established is not that of debtor and creditor, but of member and company. It is the company's money, and the members can never recover it; thus no debt is created: Companies Act 1862, s. 38, sub-s. 7. Page Wood V.-C. in *Macdougall* v. *Jersey Imperial Hotel Co.* (2) held that any payment to shareholders out of capital and before a dividend had been realized was ultra vires; so *In re National Funds Assurance Co.* (3); *Flitcroft's Case* (4); *Guinness* v. *Land Corporation of Ireland.* (5) In the last case (6) Cotton L.J.

(1) [1896] 1 Ch. 397.
(2) 2 H. & M. 528.
(3) 10 Ch. D. 118.
(4) 21 Ch. D. 519, 533.
(5) 22 Ch. D. 349.
(6) 22 Ch. D. at p. 375.

describes capital as "the fund which is to pay the creditors in the event of the company being wound up"; and consequently "whatever has been paid by a member cannot be returned to him." Equally decisive is *Masonic and General Life Assurance Co.* v. *Sharpe.* (1) Stirling J. below relied on *Dale* v. *Martin* (2)—a case never cited before except in *In re Exchange Drapery Co.* (3) The present case is within the mischief aimed at by *Trevor* v. *Whitworth* (4), and is a trafficking by the company in its own capital; and the effect of *Ooregum Gold Mining Co. of India* v. *Roper* (5) is that by no device may capital be returned to shareholders. It is a breach of the obligation imposed by the Legislature upon the company as a condition of the statutory limitation of liability by shares, that the registered capital of the company shall be reserved for the payment of the company's debts. What is being done is obviously unfair to the great body of shareholders who have not paid calls in advance, and is open to the gravest abuse.

Graham Hastings Q.C. and *C. E. E. Jenkins* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, I have heard with surprise that some difficulty has been supposed to arise with regard to the true construction of the statute to which reference has been made in this case. It appears to me that, applying the ordinary principle of construing statutes in the usual way, by giving to each member of a sentence its true and ordinary meaning, there is no difficulty in the proper decision of this case.

The language of the 7th section of Table A seems to me not susceptible of any doubt at all. Whatever might have been argued with reference to what has been called the general law without Table A, or without that portion of it to which reference has been made, I confess I do not think it very material to consider; because the insertion of Table A with the 7th section, giving a sanction by the Legislature to an

(1) [1892] 1 Ch. 154.
(2) 9 L. R. Ir. 498; 11 L. R. Ir. 371.
(3) 38 Ch. D. 171, 174.
(4) 12 App. Cas. 409.
(5) [1892] A. C. 125.

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arrangement which is exactly the same as the present arrangement in principle, and indeed almost in words, seems to me to remove all doubt whatever from this matter. The relation between a company and the members is intelligible enough, and, but for the example given in Table A, some of the arguments that we have heard might have found some place. I suppose it was by reason of there being a doubt in the minds of the Legislature as to whether or not that would be considered to be a legitimate arrangement that this 7th section was expressly inserted. Whatever may be the meaning of it, or whatever reason the Legislature may have had for placing it there, there it is, and to argue that it is ultra vires to do that which the Legislature has expressly sanctioned in the example it has given of the articles of association in the statute itself seems to me to be somewhat absurd.

Of course, if you can introduce into the language which the Legislature has used other language which would have a different effect (and that has been practically the argument addressed to your Lordships), you may turn any statute or any section of any statute into an absurdity. But Table A and the 7th section expressly say that "the directors may, if they think fit," make such an arrangement as has here been made; and every effort to turn those plain words into something else has resulted, on the part of the learned counsel who argued it, in an admission that, without the addition of some words, they cannot get into that 7th section that which their argument requires.

Then, my Lords, it remains that that is an arrangement which the Legislature has sanctioned in the case of Table A, and the statute expressly gives that as an example of what may be done unless the company think proper to adopt articles of their own. In this case they have adopted articles of their own which have precisely the same effect. Under these circumstances it appears to me that it is an undue compliment to the doubts which have been suggested to do more than say that I entirely concur in every word of the judgment of FitzGibbon L.J. in Ireland and in every word of the judgment of Lindley L.J. in this country.

The only commentary I am disposed to make is that Lindley L.J. does seem to suggest that the words are not absolutely apt for the purpose. With the greatest deference to his Lordship, I do not concur in that opinion. It seems to me that the words are very plain and apt for the purpose for which they are designed by the Legislature, and it would be, to my mind, a most perverse proceeding to construe these words in any different sense because by some improper use of the power thus given it might be made mischievous in its operation. If it were mischievous in its operation and necessarily mischievous it would, to my mind, be no argument, if the statute has expressly authorized the thing to be done. But, as a matter of fact, what has been done in this particular case is admitted to have been done perfectly bonâ fide and with no such abuse as it has been pointed out might result. What the case would be if any directors thought proper to abuse the power so given for the indirect purpose of doing that which the statute forbids, it is not necessary to consider, because that question does not arise here. It appears to me that the argument is reduced to this: that because a particular provision is capable of being misused, although the Legislature has sanctioned the use of it, therefore your Lordships are called upon to repeal the statute and to say that the legitimate and proper use should not be permitted. That seems to me to be a view which is wholly inadmissible.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD HERSCHELL. My Lords, I am of the same opinion, and I shall trouble your Lordships with very few words, because I entirely agree with my noble and learned friend that the case is a particularly clear one.

It is not susceptible of contention that to do what s. 7 of Table A provides for can be ultra vires. The Legislature can never have enacted that if the company do not otherwise provide their articles of association shall be such as will provide for something ultra vires. The present case comes within the very terms of s. 7 of Table A.

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But then it is said that these terms must be qualified or limited, inasmuch as it never can be lawful to make a payment to a member in his character of member out of the capital of the company—that such a payment could only be made out of profits. My Lords, it seems to me that there is no justification for inserting any qualification or limitation in the very clear words used in s. 7 of Table A.

But, besides that, I think it is a fallacy to speak of this payment of interest as being a payment made to a member in his character of member. As member he has no right to have that interest paid to him: he could not claim it. As member he was under no obligation to make the payments in consideration of which the company undertook to pay the interest. When, therefore, the company, although they received the money from a member, received it from him without any obligation upon him as a member to pay it, and undertook to make a payment to him in consideration of it which they were not under any obligation to make to him as a member, it seems to me that it is manifestly erroneous to describe this as a payment made to a member in his character of member. If so, the whole argument falls to the ground.

LORD MACNAGHTEN. My Lords, I agree. Sect. 7 of Table A authorizes the directors of a company limited by shares to agree with any member for an advance of money on the terms that the money so advanced is to be applied in discharge of the member's liability on his shares when and as that liability ripens into a debt presently payable, and that in the meantime the member is to be entitled to interest on the advance as if he were an ordinary creditor of the company. The interest is to be due to him in the character of creditor, not in his character as member. I think that is the plain meaning of the section, and that you cannot give the section another meaning unless you qualify the word "interest" by reading in or inserting the words "contingent on profits," or some other words indicating that interest is payable only out of moneys applicable for the payment of dividends. Of course, an arrangement of this sort to be good and valid must be made in good faith and in the honest

exercise of the discretion confided to directors. Directors acting otherwise would be exposed to very serious liability, and might be called upon to repay all moneys improperly paid out of capital under colour of paying interest.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I am of the same opinion. I think the reasons in support of the judgment have been extremely well expressed, if I may venture to say so, by Lindley and Kay L.JJ. in the Court below, and I entirely concur in the reasons which your Lordships also have given for affirming the judgment.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 18, 1896.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondents: *Trinder & Capron.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 May 5.

HULBERT AND CROWE . . . . . APPELLANTS;

AND

MARY CATHCART . . . . . RESPONDENT.

Practice—Procedure—Non-payment of Costs—Sequestration—Discretion—Order XLIII. r. 7.

When application is made for leave to issue a sequestration for non-payment of costs the Court or judge should be satisfied that the application is reasonable, but it is not necessary to point to any particular property which may be made available for the payment of the costs by sequestration.

When the Court or judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior Court unless it is shewn that there has been an improper exercise of the discretion or some miscarriage of justice.

The following statement is taken from the judgment of Lord Herschell:—

In this case orders were made upon several occasions for the payment by the respondent to the appellants of the costs of certain proceedings. The total sum thus ordered to be paid by way of costs between December 12, 1893, and February 26, 1894, amounted to 62*l.* 13*s.* 8*d.* None of those sums ordered by the Court to be paid by the respondent to the appellants have been paid.

Under those circumstances the appellants applied at chambers for an order of sequestration, and an order was made by the master at chambers that a writ of sequestration should issue against the respondent's separate estate not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property should be liable to sequestration notwithstanding such restriction. The order so made was affirmed on appeal by Lawrance J., and again by the Divisional Court (Wills and Collins JJ.). The Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.), to whom there was a further appeal

by the respondent, reversed those orders, and it is from that decision that the present appeal is brought.

The application was made upon an affidavit alleging that "the defendant is possessed of considerable wealth, and is in receipt of a yearly income of 3500*l.* or thereabouts from property both real and personal." That property, the affidavit went on to say, was comprised in two settlements in each of which there was a restraint upon anticipation, but nevertheless it shewed the respondent to be in receipt of a considerable income. There was no answer put in by way of reply to that affidavit, and therefore the matter proceeded upon the statements contained in the affidavit.

By Order XLIII. r. 7, "No subpœna for the payment of costs, and, unless by leave of the Court or a judge, no sequestration to enforce such payment, shall be issued."

May 5. *Oswald, Q.C.*, and *G. H. Mallinson*, for the appellants. The issue of the writ of sequestration is a matter of discretion, and the discretion was rightly exercised by the master, and it is difficult to understand why the Court of Appeal should have overruled the master and judges below. There are large estates and timber which the sequestrator can sell. Why should the Court place obstacles in the way of a creditor seeking to enforce just debts? There is no foundation either in law or common sense for the doctrine that the sequestrator must prove that there is property against which the writ can operate, and there are authorities which shew that he is under no such necessity. The Debtors Act, 1869, s. 8, made arrest unnecessary; and Order XLIII. r. 7 gives the Court or judge a discretion. In *Snow* v. *Bolton* (1) Fry J. ordered sequestration to issue for payment of costs. In *Crowther* v. *Elgood* (2) the Court of Appeal refused to interfere with the discretion exercised by Kay J. to punish, and Cotton L.J. said the question was whether the debtor once had the money.

That there is no necessity to prove the existence of property is shewn in *Clinton* v. *Clinton* (3), which was a case of alimony.

(1) 17 Ch. D. 433. (2) 34 Ch. D. 691.
(3) L. R. 1 P. & D. 215.

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Lord Penzance said: "The writ must go, and you must make what use of it you can." In *Hyde* v. *Hyde* (1) sequestration was ordered without personal service, and in general terms without defining the property of the married woman; but it was to operate only against arrears, not against future property which the married woman was restrained from anticipating. In *Miller* v. *Miller* (2) the authority of Kindersley V.-C. and other equity judges was cited by Lord Penzance to prove that it was the old practice of the Court of Chancery before the Debtors Act without attachment to issue sequestration. At the date of the sequestration there were arrears of rent as to which the restraint on anticipation had gone: *Hood Barrs* v. *Heriot.* (3) See also *In re Lumley, Ex parte Cathcart* (4), *Worrall* v. *Worrall* (5), *In re Armstrong* (6), and Married Women's Property Act, 1882, s. 19.

The respondent in person.

Oswald, Q.C., replied.

LORD HERSCHELL (after stating the facts given above). My Lords, the Court of Appeal reversed the order of the Court below upon the ground that it was not shewn in the appellants' affidavit that there was property of the respondent which could be made available if the sequestration were to issue, and that inasmuch as by the 7th rule of Order XLIII. "no subpœna for the payment of the costs and, unless by the leave of the Court or a judge, no sequestration to enforce such payments shall be issued," the discretion which the judge was to exercise ought so to be exercised as that unless the person applying for the sequestration shewed that the sequestration could be made available in respect of property of the respondent which would enforce satisfaction by the payment of costs, the sequestration ought not to issue. Kay L.J. said that the sequestration was really wanted because they meant to employ the sequestrator to find out, if he could, some kind of property to which the lady might be entitled.

(1) 13 P. D. 166.
(2) L. R. 2 P. & D. 54.
(3) [1896] A. C. 174.
(4) [1894] 2 Ch. 271.
(5) 11 Times L. R. 573.
(6) 21 Q. B. D. 264.

My Lords, I confess it does not seem to me that there would be anything wrong in the use of a sequestration for a purpose of that kind. It is to be observed that the respondent was ordered by a Court of Justice to pay these costs, and that those orders of the Court had been treated with contempt. That being so, it is, as it seems to me, only right and proper that every legal process should be employed to compel the person who has treated those orders with contempt no longer to treat them with contempt, but to make the payment which those orders directed. No doubt it is in the discretion of the judge whether or not he will issue the order. That discretion is a matter for the first time introduced under the Judicature Act. Before that there was as a matter of course a subpœna for costs if the order for payment was not obeyed. That was followed by an attachment. The attachment was followed by a sequestration. The creditor who ought to have been paid the costs had the right to that process of the Court to enforce them. The first change made was in the Debtors Act, which did away with the attachment of the body of the debtor; then there was a provision that you might have a sequestration though you could no longer attach the person of the debtor. Then came the Judicature Act, the object of which was to simplify the procedure, and to render it unnecessary to go through the process of subpœna first and then the subsequent applications, but to enable the order to be obtained in the first instance for a sequestration without the other preliminaries. But having made the provision for the immediate issue of the sequestration without those preliminaries, it was of course necessary to take precautions against abuse. The subpœna which had to be first served gave the party notice, and gave him an opportunity of making payment before so stringent a measure as the sequestration was put in force. It would not have done to have allowed the sequestration to be immediately issued at the instance of the creditor and without any previous notice, and consequently one can quite well understand why an order of the judge was interposed in order that he might see that this more summary procedure was not made the subject of abuse by the creditor; but I do not myself think that it had any further object: I think it was intended

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to enable the debtor to bring before the judge any reason which would satisfy him that the sequestration ought not to issue. One of those reasons undoubtedly would be proof to the judge that the sequestration would be a mere idle and futile proceeding, adding to the costs and securing no advantage to the creditor. No doubt that would be a ground upon which a judge might refuse to issue a sequestration. Or it might be shewn that the debtor was about to pay—had given notice that as soon as certain rents were received payment would be made, or had given security. Numberless other cases might be suggested in which the judge might have refused to issue the sequestration; but I cannot myself agree with the view which seems to have been entertained, that it rests with the creditor who has obtained from the Court an order for the payment of his costs to ferret out, first, information as to the means of the debtor, and then to secure proof that, if he gets the sequestration order, the sequestrator will be able practically, by the stringency of the process, to procure for him his costs. I think that puts the issue upon the wrong person. Primâ facie, the person who has obtained an order of the Court which has been treated with contempt has a right to the process of the Court to secure that its orders shall not be so treated; and it seems to me to rest upon the debtor who alleges that the proceeding would be futile to shew to the Court that it would be so.

Now, in the present case it is stated that the respondent has a large yearly income, and I do not think there is anything to shew that this sequestration will necessarily and inevitably be futile. It is enough to say that. It is impossible now to determine, and this is not the time for it, what could be seized, or whether the result of the proceeding will be to secure to the appellants their debt or not. Of that they take the risk. There are certain arrears of a married woman's income which this House has held would be available. That such arrears exist in the present case, I admit, is not shewn; on the other hand, it is not shewn that there are not such arrears.

I cannot myself also do otherwise than express the opinion that where an order for a sequestration has been made by a master and confirmed by the Court in which he is master,

namely, the Divisional Court of Queen's Bench, the exercise of that discretion ought not to be interfered with unless it is clear that it has proceeded on some erroneous principle. It ought not to be reversed merely because if it had come in the first instance before another tribunal that tribunal might have decided the matter differently. I do not see any ground myself for interfering with the judgment of the Divisional Court of Queen's Bench; and for these reasons I think that the appeal must be allowed with costs, both here and in the Court of Appeal. I move your Lordships accordingly.

LORD WATSON. My Lords, I entirely concur in what has been said by my noble and learned friend. I think the discretion vested in the judge by Order XLIII. r. 7 was rightly exercised by Lawrance J., and that there were no grounds for disturbing its exercise by the Court of Appeal.

LORD MACNAGHTEN. My Lords, I agree. The rule that provides that an order for sequestration is not to issue without the leave of the Court or the judge seems to me to be a very proper provision. It is right, I think, that the Court or the judge before whom the matter is brought should be satisfied that the application for a sequestration is not an application made for the purpose of increasing costs or too hasty, or in any way unreasonable. But I do not think it is necessary that the applicant should be able to point to some particular property which may be made available for the payment of the costs by the process of sequestration. And it seems to me that when the Court or the judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior Court unless it is shewn that there has been an improper exercise of the discretion or some miscarriage of justice.

LORD SHAND. My Lords, I am of the same opinion, and have nothing to add.

LORD DAVEY. My Lords, the rule which has been referred to seems to me to have vested in the judge before whom the

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case may come a discretion as to whether a sequestration for costs should issue in that particular case. No doubt, my Lords, it is what may be called a judicial discretion; but if the learned judge below has exercised his discretion, it ought not to be interfered with by a court of appeal unless the judge below has decided the case upon an erroneous principle, or has omitted to take into consideration something which ought to have influenced his judgment.

Now, my Lords, I cannot see, in the present case, any suggestion that in the Court below Lawrance J. or the master before whom the case came did not exercise his discretion. I think he did so. He exercised his discretion by allowing the writ of sequestration to issue. If we were to encourage appeals from an order of a master or a judge in chambers on a question such as this, we should be leading to the multiplication of idle appeals on mere questions of practice which ought to be settled one way or the other by the judge before whom they first come, and to the piling up of perfectly useless costs.

I do not say, and I do not think it necessary to say, whether I should or should not have exercised my discretion if it had come before myself in the first instance in the same way as Lawrance J. has done. I agree with the Court of Appeal that if it be made reasonably clear that the sequestration is an idle proceeding, and cannot result in obtaining payment of the judgment debt out of any property of the debtor or serving any other useful purpose, and can only result in adding to the costs of the proceedings, then the sequestration ought not, speaking generally, to issue. The affidavit in the present case does not appear to me, I own, to point out any property to which the sequestration can apply; but I agree with what has been said by my noble and learned friend now on the woolsack, that where a debtor is keeping off his judgment creditor at arm's length you are not to be nice in finding out reasons for preventing the creditor making use of such legal weapons as the law places in his hands for the purpose of recovering his debt; and if the creditor says that he is willing to take the chance of whether he recovers anything or not, I think the judge in the Court below, the judge who has to exercise his discretion,

might legitimately consider that it was a case in which the writ might issue notwithstanding that the affidavit failed to point out any particular class of property to which it could apply. I therefore concur with your Lordships in thinking that this appeal should be allowed.

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Order of the Court of Appeal reversed, and orders of the Queen's Bench Division restored with costs here and below: cause remitted to the Queen's Bench Division.

Lords' Journals, May 5, 1896.

Solicitor for appellants: *A. J. Pidduck.*

[HOUSE OF LORDS.]

THE GUARDIANS OF WEST HAM UNION . . . . . } APPELLANTS;

AND

THE CHURCHWARDENS AND OVERSEERS AND GUARDIANS OF THE POOR OF THE PARISH OF ST. MATTHEW, BETHNAL GREEN . } RESPONDENTS.

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Poor Law—Guardians—Limitation of Time for Payment of Debt—Jurisdiction of House of Lords over Costs—Costs of Appeal in House of Lords—Poor Law (Payment of Debts) Act 1859 (22 & 23 *Vict. c.* 49) *ss.* 1, 4.

An order of this House for payment of the costs of an appeal without specifying the amount does not constitute a "debt, claim or demand lawfully incurred or become due" within the meaning of the Poor Law (Payment of Debts) Act 1859 ss. 1, 4, until the amount has been certified by the Clerk of the Parliaments under the Standing Orders, and the time for payment limited by that Act runs from the date of the certificate and not from the date of the order.

This House has an inherent jurisdiction, independent of statute, over costs in proceedings before itself.

The decision of the Court of Appeal ([1895] 1 Q. B. 662) reversed.

THE following statement of facts is taken from the judgment of Lord Herschell:—

On March 20, 1894, this House resolved that an order or

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judgment of the Court of Appeal, and also the order or judgment of the Queen's Bench Division affirmed by it, should be reversed, and further that the respondents should pay to the appellants the costs incurred by them in respect of the appeal to this House. (1) Some controversy having arisen about the form of the order, it was not finally settled until June 12, 1894. The appellants then delivered their bill of costs in the appeal from the Court of Appeal to this House, which was taxed in July; and on August 3 the Clerk of the Parliaments certified the amount of the costs to be 298*l.* 17*s.* 2*d.* On October 24 following, the judgment of this House was made a rule of the Queen's Bench Division. The appellants having threatened to levy an execution on the property of the guardians of Bethnal Green, that Court (Wills and Wright JJ.) granted a stay of execution, on the ground that the time allowed for payment of the costs under the Poor Law (Payment of Debts) Act 1859 had elapsed, and that payment therefore could not be enforced. That decision was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.). (2) From these decisions the present appeal was brought.

By the 1st section of that statute it is enacted that "with respect to any debt, claim, or demand which may after the passing of this Act be lawfully incurred by or become due from the guardians of any union or parish . . . . such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year but not afterwards." The half-years referred to end on March 25 and September 29 in each year. The 4th section of the same statute provides that if a person claiming any debt or demand commences proceedings within the time limited in s. 1 and prosecutes them with due diligence to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians notwithstanding that it may be recovered or such final settlement arrived at after the expiration of the period provided.

March 5, 6. *Lawson Walton Q.C.* and *E. Morten* for the

(1) [1894] A. C. 230, 242. (2) [1895] 1 Q. B. 662.

appellants. The Poor Law (Payment of Debts) Act 1859 is not a statute of limitations, but a disciplinary Act regulating the conduct of guardians. But assuming it to be a Statute of Limitations there was no "debt, claim or demand incurred or become due" until the Clerk of the Parliaments gave his certificate under the Standing Orders for the amount of the costs. In *Midland Ry. Co.* v. *Edmonton Union* (1) Lord Herschell's and Lord Watson's view was that no "debt, claim or demand" becomes due before the taxation of costs. Churchwardens and overseers are not guardians, and notice of appeal was addressed to the Bethnal Green guardians as well as to the churchwardens and overseers, and an order for payment of costs was made against both. 11 & 12 Vict. c. 91, s. 1 gives power to overseers to discharge the debts of their predecessors. See also 39 & 40 Vict. c. 61, s. 29. The power of this House to give costs does not depend on statute. The Lord Chancellor in Chancery always gave costs irrespectively of any statute, and the House has inherent jurisdiction to give costs.

Sir E. Clarke Q.C. and *Beven* for the respondents. By s. 109 of 4 & 5 Will. 4, c. 76, "guardian" includes "any visitor, governor, director, manager, acting guardian, vestryman, or other officer" engaged in poor law relief, and comprehensive meanings are also given to the words "officer," "overseer," "churchwarden," &c. The time at which costs are due and recoverable is not the date of taxation, but that of the judgment or order to pay costs: *Cargey* v. *Aitcheson* (2); *Holdsworth* v. *Wilson* (3), which was expressly approved in *Metropolitan District Ry. Co.* v. *Sharpe.* (4) So *Re Cumming.* (5) In *Pyman* v. *Burt* (6), which has since been followed, interest was declared to be payable on costs from the date of the judgment, not of the allocatur. See also *Marbella Iron Ore Co.* v. *Allen.* (7) Further, even assuming the word "debt" in the Poor Law (Payment of Debts) Act 1859, s. 1, to be applicable to ascertained sums merely and not also to sums ascertainable, the

(1) [1895] A. C. 485, 491.
(2) 2 B. & C. 170, 177.
(3) 4 B. & S. 1.
(4) 5 App. Cas. 425.
(5) 2 D. F. & J. 376.
(6) W. N. (1884) 100.
(7) 47 L. J. (C. P.) 601; 38 L. T. 815.

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words " claim or demand " include unliquidated sums such as untaxed costs. The appellants are therefore not within the time limited: *Reg.* v. *Stepney Union* (1), per Blackburn J.

This House, like the Courts below, has no power to give costs except by statute. This House is defined as a Court in the Common Law Procedure Act and in the Appellate Jurisdiction Act 1876, and the statutory character of this House's power to give costs is pointed out by Willes J. in *Gann* v. *Johnson.* (2) See also *The Postnati* (3), per Lord Ellesmere; *Kemp* v. *Squire* (4); Comyns' Dig. Parliament, L 5; *Ashby* v. *White* (5); *Johnston* v. *Johnston* (6); *Garnett* v. *Bradley* (7), per Lord Hatherley and Lord Blackburn: " Costs in Courts of Common Law were not by common law at all: they were entirely and absolutely creatures of statute." In *London County Council* v. *West Ham* (8) it was decided that on the Crown side of the Queen's Bench Division the practice is unaltered by the Judicature Act 1890, and that there is no power to give costs to a successful appellant in a case stated by quarter sessions. And this House has no power to give costs in a case where the Courts below had no power. It has been claimed that the Chancellor possessed inherent jurisdiction over costs, and that by analogy this House must possess a like power; but in view of 17 Rich. 2, c. 6 and 15 Hen. 6, c. 4, this can hardly be maintained. In the Statute of Gloucester (6th Edw. 1) the word " damages " is used, and costs apart from statute are damages which include costs: see Beames on Costs in Equity, 4, and 1 Spence, Eq. Jur. 392. But the power of the Chancellor was not exercised under the law: it was in fact an ecclesiastical usurpation; and in the Year Book 4 Hen. 7, p. 4, pl. 8, Archbishop Morton employed a coercive sanction with reference to another world which would hardly be recognised now. In *Pringle* v. *Secretary of State for India* (9) Bowen L.J. claims for the Court an inherent jurisdiction when it was

(1) L. R. 9 Q. B. 383, 399.
(2) L. R. 6 C. P. 461, 463.
(3) 2 State Trials, at p. 667.
(4) 1 Ves. Sen. 205, 207.
(5) 14 State Trials, at p. 814.
(6) 3 Macq. 619.
(7) 3 App. Cas. 944, 953, 962.
(8) [1892] 2 Q. B. 173.
(9) 40 Ch. D. 288.

wrongly put in motion; but that is not the case here, as the respondents are brought to this House unwillingly.

This House has never asserted an inherent jurisdiction, and has always abstained from giving costs apart from statute. The jurisdiction on writs of error is derived from the 3rd Hen. 7, c. 10. Neither the Common Law Procedure Acts nor the Appellate Jurisdiction Act 1876 extends the power of giving costs previously possessed by this House. That there was no such power apart from statute is shewn by *Pender* v. *Rex* (1); *Bishop of Ely* v. *Dr. Bentley* (2); *Lord Advocate* v. *Lord Douglas* (3); *Smith* v. *Earl of Stair* (4); *Reg.* v. *South Eastern Ry. Co.* (5); *Harrison* v. *Stickney.* (6) In *Bank of Ireland* v. *Trustees of Evans' Charities* (7) no costs were given to the respondents—which can only be explained on the absence of power to give costs. There are many earlier cases on venire de novo in which costs are never given, of which one was *Mayor of Shrewsbury* v. *Kynaston* (March 31, 1737). (8) See also *Cooper* v. *Slade* (9); *Attorney-General* v. *Dean of Windsor* (10); *Bodily* v. *Bellamy.* (11)

It is claimed that the House has this power inherent in it as the supreme Court of Appeal. But the powers of the House are a delegation from the Sovereign; and that not generally, but in individual cases, and then only to certain selected peers. This is the clear doctrine laid down in Hale's Jurisdiction of the Lords House, c. 32; Reports on the Dignity of a Peer, vol. i. p. 20; Elsynge, Ancient Method of Holding Parliaments, 2nd ed. c. 8, "Receivers and Triers of Petitions"; Palgrave, The King's Council, 82; and 14 Edw. 3, c. 5. See also Hallam's Middle Ages, vol. iii. 144, and *Lord Banbury's Case.* (12) It is clear from the Statute of Gloucester that the Crown had no

(1) Lords' Journals, March 18, 1725, vol. xxii., 624, 626.
(2) Lords' Journals, vol. xxiv., 183, 186; 2 Str. 912.
(3) 1 Bell's Ap. Ca. 93, at pp. 99.
(4) 6 Bell's Ap. Ca. 487.
(5) 4 H. L. C. 471, 480.
(6) 2 H. L. C. 108, 130; also Lords' Journals, February 12, February 19, April 3, April 30, 1849, and August 11, 1854.
(7) 5 H. L. C. 389.
(8) Lords' Journals, vol. xxv., 68.
(9) 6 H. L. C. 798, n.
(10) 8 H. L. C. at p. 459.
(11) 2 Burr. 1094.
(12) 2 Ld. Raym. 1247.

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such power, and could only give costs according to common law. The Appellate Jurisdiction Act does not extend the power, as by s. 4 the House must act "according to the law and custom of this realm," by which no costs are given to a successful appellant in certiorari: see *Calvin's Case* (1), Corner's Crown Practice, p. 79, and Short and Mellor's Crown Practice, 142. See also *Skinner's Case* (2); Hargrave's Preface to Hale, clii. et seq.: *Witham* v. *Hill* (3); Beames, Costs in Equity, 4.

Lawson Walton Q.C. in reply. The opinion of Mr. Beames is directly negatived by Fry L.J. in *Andrews* v. *Barnes*. (4) In *Corporation of Burford* v. *Lenthall* (5) Lord Hardwicke exercised an extra-statutory jurisdiction, and said the Chancellor had exercised several jurisdictions which the King's Bench could not exercise. In *Jones* v. *Coxeter* (6) Lord Hardwicke even ordered the defendant to pay part of the plaintiff's costs to enable her to go on with the action. The House now hears all appeals under one form, and the Judicature Acts prescribe that the rules of common law must give way to those of equity.

As to the Payment of Debts Act, no duty arose until the amount was ascertained. The order was to pay the costs as certified by the Clerk of the Parliaments.

The House took time for consideration.

May 18. LORD HERSCHELL (after stating the facts given above). It is contended on behalf of the respondents that in the present case the debt, claim, or demand was incurred or became due on March 20, when judgment was pronounced in this House, that the time for payment consequently expired on June 25, and that, no proceeding having been commenced until after that date, namely, until October 24 following, the guardians became unable to pay it. This view was adopted in the Courts below.

It is further contended for the respondents that this House had no power to order the payment of costs as it did by the judgment already referred to. The contention is based on the

(1) 2 State Trials, 607, 7 Rep. 1.
(2) 6 State Trials, 709.
(3) 2 Wils. 91.
(4) 39 Ch. D. 133, 139.
(5) 2 Atk. 550.
(6) 2 Atk. 399.

proposition that no tribunal in this country, including your Lordships' House, has power to order the payment of costs unless authorized to do so by statute, and that there was no enactment giving that authority applicable to the judgment of March 20. It is further said that the appeal arose in a proceeding in which the Courts below had no power to award costs, and that this being so the House of Lords is equally destitute of that power.

It was conceded that this House had often ordered payment of costs in the case of writs of error from the Common Law Courts, and also in appeals from the Court of Chancery. But it was alleged that in both cases the authority to do so rested on statute. Mr. Beames in his work on Costs does, it is true, suggest that the jurisdiction of the Court of Chancery to award them depends on the power vested in the Chancellor for the time being by the 17 Rich. 2, c. 6. But this statement seems to be open to much doubt. From what was said by Lord Hardwicke in the case of *Corporation of Burford* v. *Lenthall* (1), that distinguished lawyer does not appear to have treated this as the origin of his jurisdiction. But, however that may be, I am quite unable to see how a power conferred by statute on the Lord Chancellor to be exercised "according to his discretion" can have been the origin of the power of this House. The jurisdiction of this House is in no way connected with the presence of the Lord Chancellor. His presence is not essential to its proceedings. The power and jurisdiction of this House are precisely the same whether he be present or absent. Costs have been awarded in such appeals for upwards of two centuries. I see no other foundation on which the power to order their payment can be rested except the inherent authority of this House as the ultimate Court of Appeal. If it possess such authority there is no reason for limiting it to appeals in Chancery cases only, or for excluding any class of appeals from its exercise. I am unable to find any tenable ground for the proposition that this House can only order payment of the costs of an appeal where the Courts below could have ordered payment of the costs of the proceedings in those Courts. It

(1) 2 Atk. 550.

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seems to me that the one power is in no way dependent on or controlled by the other, though no doubt this House has sometimes considered in particular appeals the practice in the Court below when determining how it would deal with the costs of the appeal.

It is certain that this House has during the last twenty years in a great number of cases exercised without question the power which is now denied. The Appellate Jurisdiction Act of 1876 assumed, I think, the existence of the power. It abolished the former procedure which regulated appeals to this House, and created in all cases a uniform practice. All appeals are now commenced by a petition of appeal. A writ of error is no longer a process applicable to appeals to this House. Moreover, it dealt with a state of things in which the old division of jurisdiction between the Common Law Courts and the Court of Chancery had ceased to exist. Yet the statute contains no provision with reference to costs. If the argument for the respondents be well founded, what is the position of this House now with regard to costs? Does it no longer possess power to award them in any case? Or must inquiry be made in each case, though all come alike before the House by petition of appeal, by what process the appeal would have been prosecuted, or what Court would have disposed of it, if the Judicature Act and the Appellate Jurisdiction Act had not been passed, and must the answer to this inquiry determine whether this House has power to order the payment of costs or not? It is obvious that nothing of the kind can have been intended or contemplated. I think the contention of the respondents, with which I have hitherto dealt, wholly fails.

I proceed to consider their other contention which found acceptance in the Courts below. The argument there appears to have involved much discussion as to the effect of the delay which took place before the form which the order should take was finally settled. I agree in thinking that this is wholly immaterial. The argument of the appellants, however, that the order for the payment of costs was not complete until the amount was certified by the Clerk of the Parliaments, appears to me more substantial than it was thought to be by the Courts

below. In former times the amount to be paid for costs was named by this House at the time when the judgment was pronounced. The matter is now regulated by the tenth of the Standing Orders relating to appeals. It provides for the appointment of a taxing officer by the Clerk of the Parliaments in all cases in which this House orders the payment of costs without specifying the amount, and for a certificate by the Clerk of the Parliaments of such costs, and provides that "the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs." Accordingly the judgment of this House, which is now in question, ordered the payment of the costs, the amount of such costs "to be certified by the Clerk of the Parliaments." I am not satisfied that before the amount was so certified any debt or liability existed in respect of the costs which could have been enforced by legal process, or that any legal proceedings taken to enforce it would not have been premature. It is true that it was held in a case under the Lands Clauses Act that an action could be brought on the award to recover the costs before they had been taxed. But the two cases do not seem to me to be identical. Even in that case Lord Blackburn, though concurring in the decision arrived at, evidently doubted whether it rested on a sound basis. (1) But it is not necessary to pronounce a judgment on the point, or do more than indicate the doubts I entertain, for I am of opinion that at all events there was not until August 3 any debt, claim, or demand incurred, or become due within the meaning of the Poor Law (Payment of Debts) Act 1859. Since the present case was before the Court of Appeal, the case of the Edmonton Union came before this House for consideration. Some observations were then made by my noble and learned friend Lord Watson and myself upon the provisions of the statute. (2) I adhere to what I then said. The first section was not designed, as Statutes of Limitation are, to prevent stale demands, though it may incidentally bar the remedy of creditors who delay asserting their rights. Both in form and purpose it is an injunction on the guardians to discharge their obligations

(1) 5 App. Cas. 425, 446. (2) [1895] A. C. 485, 491, 493.

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promptly. It provides that the debt, claim, or demand "shall be paid" within the time limited. I think it must refer to debts which the guardians could and ought to have paid within the time limited, and not to such as could not properly be paid within that time, inasmuch as the amount had not been ascertained in the manner provided by law. How could the guardians in the present case possibly have discharged their obligation to pay these costs before June 25? The amount payable was the sum to be certified by the Clerk of the Parliaments. They could not foresee what this would be, and there were no other means of ascertaining the extent of their obligation. If the words "shall be paid" applied to these costs before August 3, what were the guardians to do? The words are imperative and absolute. Were they to offer a sum which would certainly cover the amount which was likely to be certified, and so perhaps make an overpayment? In my opinion it was not until the certificate of the Clerk of the Parliaments was given that the statutory provision became applicable. I must not be understood as saying that if the amount of a debt or liability remained unascertained owing to neglect on the part of the guardians the case might not bear a different aspect. No such question arises here. It was urged that the appellants might, by commencing legal proceedings before June 25, have avoided all difficulty, and enabled the guardians to pay the amount of the costs after that date, and no doubt if the respondents are right the appellants were bound to take that course unless they were willing to lose their debt. I have already expressed a doubt whether such proceedings would have been competent; but supposing them to be so, what would have been the result? In order to warrant the guardians in making the payment the proceedings must have been prosecuted with due diligence to judgment or other final settlement. This would have necessarily involved the payment by the guardians of the additional costs thus occasioned without, as far as I can see, advantage to any one. This confirms me in thinking that the construction I put upon the statute is the right one.

Therefore, my Lords, I think the judgment of the Court below must be reversed, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, the only question in this case, as it seems to me, is whether the order of this House, dated March 20, 1894, disposing of the costs of the appeal then before the House, constituted a "debt, claim, or demand" incurred by or due from the churchwardens and guardians of Bethnal Green, within the meaning of the Poor Law (Payment of Debts) Act, 1859, before the amount of such costs was certified by the Clerk of the Parliaments.

With all deference to the Court of Appeal, I cannot but think that the question must be answered in the negative. The order of this House without the certificate of the Clerk of the Parliaments created a liability, but a liability only inchoate, and one which the guardians could not have discharged by payment. It is not easy to understand how that can be a "debt" within the meaning of the Act of 1859 which is neither an ascertained sum nor a sum capable of being ascertained by ordinary process of law. Nor, again, can the order of the House in the absence of the prescribed certificate be considered as "a claim or demand" due by the respondents, because one of the Standing Orders of this House, which dates from 1835, provides that when an order for payment of costs does not in itself specify the amount there shall be a taxation by an officer of this House and a certificate by the Clerk of the Parliaments, and then it goes on to direct that the amount in money certified by the Clerk of the Parliaments shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs. That sum, therefore, is the only "claim or demand" which can be made on the party condemned in costs in this House. (1)

It was suggested in the course of the argument that the proper course in the present case would have been for the appellants to have brought an action against the churchwardens and guardians for the recovery of their costs in this House. They would then, it was said, have been within the protection of s. 4 of the Act of 1859. But it is difficult to see how such an action could lie. The grounds of convenience which induced this House in the case of the *Metropolitan District Ry. Co.* v.

(1) See Macq. Pract. H. L. Appx. No. 1, p. 781.

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Sharpe (1) to follow the decision of the Exchequer Chamber in *Holdsworth* v. *Wilson* (2) would not have any application. The Supreme Court cannot sit in review of the House of Lords. The officers of the Supreme Court are not competent to deal with costs in this House. It seems to me that the certificate of the Clerk of the Parliaments must be a condition precedent to an action at law for the recovery of costs in the House of Lords. I do not think that *Metropolitan District Ry. Co.* v. *Sharpe* (1) can be regarded as an authority to the contrary.

Before the Standing Order of 1835 it was the practice of this House to fix a lump sum for costs, and to put the sum in the body of the order. In two cases, however, it appears that this House ordered the Court of King's Bench to tax the costs of an appeal to this House. It was done in *Moore* v. *Shalcross* (February 23, 1677), and again in *Symonds* v. *Deane* (July 2, 1678). (3) What was the result? Simply this: the Court of King's Bench refused to comply with the order. It was not a matter within their province, and in each case the House was compelled to ascertain the costs for itself. It did so on a subsequent application by awarding a lump sum.

Another point was presented which seems to me to be wholly destitute of foundation. It was contended that the power of this House to award costs of an appeal to itself was derived from statute, or was somehow or other dependent on statute. Whatever colour there may be for a suggestion of this sort as regards writs of error in consequence of the mention of the King's Council in the statute 17 Rich. 2, c. 6, there can be none as regards appeals from Chancery. The better opinion seems to be that the jurisdiction of the House of Lords as regards those appeals was in its origin a mere usurpation which was established with the acquiescence of the Commons when the claim of the House of Lords to original jurisdiction was abandoned. Moreover, when the House of Lords assumed jurisdiction in Chancery appeals it entertained appeals from interlocutory orders, and on those appeals differing from the practice on final appeals it not unfrequently awarded costs to a

(1) 5 App. Cas. 425. (2) 4 B. & S. 1.
(3) Macq. Pract. H. L. pp. 420, 421.

successful appellant. It has never, so far as I know, been suggested that there was any semblance of statutory authority for dealing with the costs of appeals from interlocutory orders.

The truth is, as it seems to me, that the House of Lords, as the highest Court of Appeal, has and necessarily must have an inherent jurisdiction as regards costs. That this inherent jurisdiction is the sole authority for the action of the House of Lords in dealing with the costs of appeals is, I think, shewn very plainly by the latest alteration which this House has made in its practice with regard to that matter. For a very long period it was the practice of the House of Lords never to give costs "against a party coming to defend and sustain a decree in his favour": *Mackersy* v. *Ramsays*. (1) That was said to be an inflexible rule. But that rule was altered in 1877, after the Judicature Act was passed. And it was altered by the House of Lords of its own motion, without any statutory authority, simply on the principle which then commended itself to this House, that a successful appellant was entitled to indemnity: *Bowes* v. *Shand* (2), per Lord Cairns L.C. and Lord Blackburn.

I am therefore of opinion that the judgment of the Court of Appeal ought to be reversed.

LORD HALSBURY L.C. My Lords, my noble and learned friend Lord Morris, who is not able to be present to-day, has requested me to express his concurrence in the judgment proposed to be given by your Lordships. I also concur in it.

Order of the Court of Appeal and order of the Queen's Bench Division reversed with costs here and below; cause remitted to the Queen's Bench Division.

Lords' Journals, May 18, 1896.

Solicitor for appellants: *F. E. Hilleary*.
Solicitor for respondents: *R. Voss, Junr.*

(1) 9 Cl. & F. 818, 851. (2) 2 App. Cas. 472, 485.

Applied. WESTMINSTER v. SWINTON.
[1948] 1 K. B. 524

[HOUSE OF LORDS.]

H. L. (E.) 1896 July 30.

CONQUEST AND BOOTH . . . . . APPELLANTS;

AND

EBBETTS AND ANOTHER . . . . . RESPONDENTS.

Landlord and Tenant—Lease and Sub-lease—Repair—Covenants to keep and yield up in Repair—Damages, Measure of.

Where a lease contains covenants to keep the demised premises in repair and to deliver them up in good repair, and a sub-lease is granted containing similar covenants with notice to the sub-lessee of the original lease, and the lessee brings an action against the sub-lessee for breach of his covenant to keep in repair, it is right in assessing the damages to take into account the liability of the lessee upon the covenants in the original lease.

The decision of the Court of Appeal ([1895] 2 Ch. 377) affirmed.

IN May 1840 the then Bishop of London and others demised certain premises to Thomas Rouse for a term of sixty-one years from Michaelmas 1837 at a rent of 350*l.* a year. In March 1851 a portion of these premises was demised to Benjamin Oliver by way of underlease for the original term less ten days at the same rent, being in effect an improved rent of about 100*l.* a year. The underlease appeared from the terms used to be an underlease. The covenants to keep the demised premises in repair and to deliver them up in good repair were in substantially the same terms in the lease and underlease. The respondents were the trustees under the will of Thomas Rouse, the original lessee. The appellant Conquest was the personal representative of Oliver, the sub-lessee; the appellant Booth was an assignee of the sub-lease.

The premises comprised in the sub-lease not having been kept in repair pursuant to the covenant contained in it, the respondents brought an action in the Chancery Division against the appellants, claiming damages for breach of the covenants as to repair in the underlease, and so far as necessary administration of Oliver's estate. The assessment of damages was referred to Mr. Ridley Q.C., one of the official referees, who fixed them at

the sum of 1305*l.* At the time when the case was heard there were about three and a half years of the term unexpired. The official referee arrived at the sum named by ascertaining how much it would require to put the premises in the state of repair in which they would have been if the covenant had been observed, and then allowing a rebate from that sum in consideration of the fact that the lease had still some years to run. The Court of Appeal (Lindley, Lopes and Rigby L.JJ.) considered that there having been notice to the sub-lessee of the original lease and of the covenants contained in it, it was right to take into account in assessing the damages the liability of the respondents on these covenants, and that the damages had been properly assessed on the basis of awarding to the respondents a sum which represented the diminution in the value of their reversion due to the breach of covenant by the appellants. The Court of Appeal therefore affirmed the report of the official referee. (1) The defendants brought the present appeal.

June 16. *Haldane Q.C.* and *C. H. Sargant* (*H. Courthope-Munroe* with them) for the appellants. The true measure of damages in the present case, namely, the breach of a covenant to keep in repair—not to yield up in repair—is the depreciation in the value of the reversion. The full market value of the respondents' leasehold reversion (including the right to receive the improved rent till the reversion falls in) did not at the issue of the writ exceed 350*l.*, even if the property had been kept in repair, and the depreciation cannot exceed that full value. To give more is to indemnify the respondents against liability under the covenants in the lease to them; but the underlease contains no contract of indemnity. The respondents are not now liable to the superior landlords for damages exceeding about 200*l.*; and if they incur any fresh liability they will have a fresh cause of action against the appellants. The measure of damages for breach of a covenant to keep the demised premises in repair is not the same as if the covenant were to yield up in repair at the end of the lease. The true measure in the former case, which is this case, is the diminished value of the reversion.

(1) [1895] 2 Ch. 377.

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The decision of Lord Holt in *Vivian* v. *Champion* (1), that the test is what it will cost to put the premises in repair, was impeached in *Turner* v. *Lamb* (2) and in *Smith* v. *Peat* (3) by Parke B. In *Doe* d. *Worcester Trustees* v. *Rowlands* (4) Coleridge J. said the true question was, to what extent is the reversion injured by the non-repair? In *Penley* v. *Watts* (5) the distinction was pointed out between a covenant of indemnity and a covenant to keep the premises in a certain state of repair; and a like distinction was insisted upon in *Logan* v. *Hall.* (6) The respondents, suing on a covenant to keep in repair, are really endeavouring to get the benefit of a covenant of indemnity. In modern times the well settled practice is that the measure of damages under a covenant such as this is the depreciation of the value of the reversion: *Wigsell* v. *School for the Indigent Blind* (7); *Mills* v. *East London Union* (8); *Henderson* v. *Thorn.* (9) In *Joyner* v. *Weeks* (10) the measure of damages for the breach of a covenant to deliver up in repair was held to be the cost of putting the premises into repair; but an express distinction was drawn between a covenant to keep and a covenant to yield up in repair. The superior landlord would probably not require the respondents to put the premises into repair at the end of the term: it might not be necessary. The damages given by the official referee are purely speculative.

Jelf Q.C. and *R. F. Norton* (*E. P. Hewitt* with them) for the respondents. *Joyner* v. *Weeks* (10) is conclusive in favour of the respondents. The estimate of pecuniary damage is not the only matter to be considered. For substantial or even for merely personal or sentimental reasons a lessor may wish his property to be kept in its old condition. In *Morgan* v. *Hardy* (11) Denman J. held that the fact that the property would have been as valuable without the repairs as with them was no ground for limiting liability. So *Henderson* v. *Thorn.* (9)

(1) 2 Ld. Raym. 1125.
(2) 14 M. & W. 412.
(3) 9 Ex. 161.
(4) 9 C. & P. 734.
(5) 7 M. & W. 601.
(6) 4 C. B. 598.
(7) 8 Q. B. D. 357.
(8) L. R. 8 C. P. 79.
(9) [1893] 2 Q. B. 164.
(10) [1891] 2 Q. B. 31.
(11) 17 Q. B. D. 770.

In *Davies* v. *Underwood* (1) and *Clow* v. *Brogden* (2) it was held that the liability of the sub-lessor to the superior landlord must be taken into account in ascertaining the obligations of the sub-lessee to his immediate landlord.

Haldane Q.C. in reply.

The House took time for consideration.

July 30. LORD HERSCHELL. My Lords, the appellants in the present case contend that the damages for the admitted breach of contract to keep certain demised premises in repair have been assessed on a wrong principle.

[His Lordship stated the facts given above.]

Where an action for non-repair had been brought during the currency of a lease, it was said by Holt C.J. (in *Vivian* v. *Champion* (3)) in answer to the objection that it was a hard action, for maybe the lessee might leave the premises in repair at the end of the term, and that therefore it was usual to give but small damages: "We always inquire in these cases what it will cost to put the premises in repair and give so much damages, and the plaintiff ought in justice to apply the damages to the repair of the premises." In the case of *Doe* d. *Worcester Trustees* v. *Rowlands* (4) Coleridge J. said: "In estimating the damages in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of the damages. . . . The true question therefore is, to what extent is the reversion injured by the non-repair of the premises? If the lease had ninety-nine years to run it could not make much difference in the value of the reversion whether the premises were now in repair or not. This lease, however, will expire in about six years." I may observe that what the learned judge said with regard to a lease having ninety-nine years to run would not be applicable in all cases. There are circumstances in which it might be of the utmost importance to the reversioners that the buildings should be in a proper state of repair.

(1) 2 H. & N. 570.
(2) 2 M. & G. 39.
(3) 2 Ld. Raym. 1125.
(4) 9 C. & P. 734.

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Holt C.J.'s statement of the law has been subjected to criticism in other cases, and notably by Parke B. and Alderson B. in *Turner* v. *Lamb*. (1) I do not think any hard and fast rule can be laid down as to the damages which may be recovered by the covenantee during the currency of a lease in respect of the breach of a covenant to keep the demised premises in repair. All the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant. I quite agree with the criticism to which Lord Holt's view has been subjected if that learned judge intended to lay down that, whatever the circumstances and however long the term had to run, the damages must necessarily be what it would cost to put the premises into repair. On the other hand, I think if would be equally wrong to hold that this could never be the measure of damages, whatever the circumstances and however nearly the term had expired. But in the present case, if the test be applied of inquiring how much the value of the respondents' reversion has been diminished by the breach of covenant, a test for which I understand the appellants to contend, I cannot see that there has been any error in the assessment of damages. If the premises were now in good repair, the reversion of the respondents would secure them the improved rent of 100*l.* a year to the end of the term, without any liability on their part, unless it were to the extent to which repairs subsequently became necessary. As matters stand they can only receive this rent subject to the liability of restoring the premises to good repair, so that they may in that condition re-deliver them to their lessor. The difference between these two positions represents the diminution in the value of their reversion owing to the breach of covenant, and on this basis the damages seem to me to have been properly assessed.

It was contended for the appellants that the respondents would not be bound in any case to spend upon the premises the sum necessary to put them in repair, or at the expiration of the term to pay that sum to their lessor. It was said that owing to the nature of the premises and the changed circumstances of the

(1) 14 M. & W. 412.

neighbourhood the freeholder would make an entirely different use of the site when the term he had created came to an end, that he would not desire to have the buildings then upon his land put in good repair, and that he would arrive at some arrangement with his lessee by which he would accept from him a sum less than the cost of effecting these repairs. I do not think the Court would do right, in assessing the damages in the present case, to involve itself at the instance of the appellants in considerations of that character. The duty of the appellants as between themselves and the respondents was to fulfil the obligation of the covenant into which they entered, and to keep the premises in repair. If they had done so, the present question would not have arisen. They have broken their covenant, and when sued for the breach they have, in my opinion, no right to demand that a speculative inquiry shall be entered upon as to what may possibly happen and what arrangements may possibly be come to, under the special circumstances of the case, when the superior lease expires by effluxion of time.

I think the appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 30, 1896.

Solicitors for appellants: *Ranger, Burton & Frost.*
Solicitors for respondents: *Clarke & Calkin.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 *July* 28.

JOHN DEELEY (THE ELDER) AND WESTLEY, RICHARDS & CO., LIMITED . } APPELLANTS;

AND

THOMAS PERKES . . . . . RESPONDENT.

Patent—Disclaimer—Revocation—Patent Act 1883 (46 & 47 *Vict. c.* 57) *ss.* 19, 26.

Where on a petition for revocation of a patent the judge holds that all the claims are bad and orders the patent to be revoked and this order is entered on the Register of Patents, the Court of Appeal, if it is of opinion that one claim is valid, may reverse the order below and order that the patent be revoked, unless within three months, or such further time as the Court may allow, the patentee obtain leave to amend his specification by disclaiming all the claims except the valid one.

THIS appeal is reported only on the point dealt with in the head-note, and the material facts are stated in the judgment of Lord Herschell. It was not necessary to pronounce any decision upon the question of estoppel reported in [1895] 1 Ch. 687 (C.A.) and none was pronounced.

Feb. 25, 27, 28; June 19; July 6, 19. *Moulton Q.C.* and *Roger Wallace Q.C.* (*Horace Rowlands* with them) for the appellants.

T. Terrell Q.C. and *Rylands* for the respondent.

The House took time for consideration.

July 28. LORD HERSCHELL. My Lords, this is a petition to obtain revocation of a patent granted in 1884 to John Deeley, Junior, for an invention entitled "Improvements in the extracting mechanism of drop-down small-arms." The patent had been previously the subject of litigation, and by disclaimer the third, fourth, and fifth claims had been abandoned, and the first claim amended. The first claim in its modified form and the second claim alone remained when the petition was presented. At the trial before Romer J. it was held that both these claims were bad, and an order was made that the letters

patent be revoked. The Court of Appeal (Lord Halsbury L.C., Lindley and A. L. Smith L.JJ.) concurred with Romer J. in thinking the first claim bad, and the patent, therefore, invalid; but they came to the conclusion that the second claim was good, and that but for the presence of the first claim the patent could have been sustained. They dismissed the appeal with costs. The respondents on the petition (who were owners of the patent) then appealed to this House.

I agree entirely with the Court below in thinking that on its true construction the first claim is bad. An attempt was made to shew that the parts of the mechanism specified were claimed only in combination with the sliding-rod employed for acting upon the sear-like lever. This would make the first claim, in substance, the same as the second. In view of the terms of the two claims I do not think this construction either correct or legitimate.

As regards the second claim, I take the same view as the Court of Appeal. It was argued by Mr. Terrell, with ingenuity, that as the second claim made no mention of the extractor-rod it formed no part of the combination claimed, whereas the contrary had been assumed by the Court of Appeal. I do not think the contention a sound one. The combination is claimed "as hereinbefore described," and reading the description and the claim fairly together, although no mention is made in the claim of the extractor-rod, about which there was nothing new, the only use of the mechanism described was to strike against the end of the extractor-rod, and "thereby eject the spent cartridge-case from the barrel." So construing the second claim, no doubt could have been entertained as to the validity of the patent so far as that claim was concerned, but for the fact that a gun, called in the argument "Rigby's gun," had been in existence prior to the date of the patent. The Court of Appeal pointed out that the mechanism employed by Rigby differed in certain respects from that which formed the subject of the respondent's claim, and that there was evidence that these differences rendered the mechanism of the respondent's gun superior, as regards durability and certainty of action, to that of the gun relied on as an anticipation. There was

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evidence, no doubt, the other way; but the Court were much influenced by the fact that whilst a single gun made by Rigby was the solitary instance prior to the respondent's patent of the use of any such mechanism as the specification describes, the manufacture of the respondent's mechanism, so far as its essential portions are concerned, had become a practical and commercial success. It is impossible to shut one's eyes to the fact that the respondent, although it is open to him or any other manufacturer to use as part of a gun the mechanism employed by Rigby, and that, too, whether the appellants' letters patent stand or are revoked, has thought it worth while to take proceedings with a view to obtain their revocation. Upon the whole, then, I see no reason, and I believe all your Lordships share this view, to differ from the Court of Appeal.

The learned counsel for the appellants at the close of their argument asked your Lordships to adjourn the case in order to give them an opportunity of applying to disclaim the first claim, seeing that the second claim had been held good by the Court of Appeal. This course was accordingly adopted. Your Lordships have been informed that the comptroller, after consulting the law officers, decided that he had no jurisdiction to allow a disclaimer, on the ground that an order having been made by the Court for the revocation of the patent, and this order having been entered on the Register of Patents, there was no patent in existence capable of amendment. I do not stop to inquire whether, seeing that an appeal was pending in this House on which a final judgment had not been pronounced, this view was correct; it was at least plausible, and arguments of force may be urged in its favour. But all your Lordships are, I believe, of opinion that it would be very unfortunate if on a petition for revocation of a patent the patentee was in this position—that if the judge of first instance on any ground declared the patent invalid, the result should necessarily be an order of revocation precluding the patentee from disclaiming, however meritorious the invention and however unimportant the error which rendered it inevitable to hold the patent in its then form to be invalid. The 19th section of the Patent Act, 1883, enables the Court or a judge to order, in a proceeding for

revocation, that the patentee may be at liberty to apply for leave to amend, and to direct that in the meantime the trial or hearing shall be postponed. This provision is, however, inapplicable when the judge holds, as in the present instance, that all the claims made by the patentee are bad. And even when one claim only is held bad, it would be unjust that the patentee should be bound either to forego his right of appeal, or to lose all opportunity of amending, in case the Court of Appeal should adopt the same view as the Court below.

The 26th section of the Act which relates to the revocation of a patent contains no provision touching the form of the judgment. It only abolishes the proceeding by scire facias, and enables revocation to be obtained "on petition to the Court," prescribing certain procedure in relation to such a petition. I do not see any difficulty, therefore, in so framing the order on a petition for revocation as to avoid the possible injustice and hardship to which I have referred. The matter was not brought to the notice of the Court of Appeal, or I think they would probably have made their order in the form which I recommend your Lordships to adopt. I think that in place of an order simply affirming that made by Romer J. it ought to be ordered that the patent be revoked, unless within three months, or such further time as the Court may allow, the patentee obtain leave to amend his specification by disclaiming the first claim. The appellants must pay the costs in this House, and under the peculiar circumstances of this case I think it would be right further to order, that if the specification be amended, no action shall be brought for infringement of the patent in respect of any guns or parts of guns made prior to the date when the hearing of this appeal was concluded. I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I entirely concur.

LORD MORRIS. I concur.

LORD SHAND. My Lords, I am of the same opinion.

Order of the Court of Appeal reversed; in lieu thereof, ordered that the patent be revoked

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unless within three months or such further time as the Court may allow the patentee obtain leave to amend his specification by disclaiming the first claim; the appellants to pay the costs of the appeal to this House; further ordered, that if the specification be amended no action shall be brought for infringement of the patent in respect of any guns or parts of guns made prior to the 19th day of July, 1896; cause remitted to the Chancery Division.

Lords' Journals, July 28, 1896.

Solicitors for appellants: *Stibbard, Gibson & Co., for Rowlands & Co., Birmingham.*

Solicitors for respondent: *Wakeford, May & Woulfe.*

[HOUSE OF LORDS.]

H. L. (E.)
1896
July 31.

MAYOR, &c., OF MANCHESTER . . . APPELLANTS;

AND

McADAM (SURVEYOR OF TAXES) . . . . RESPONDENT.

Revenue—Income Tax—Exemption—Public Library—Urban Authority—"Building the Property of a Literary or Scientific Institution"—Public Libraries Act 1892 (55 & 56 *Vict. c.* 53) *ss.* 4, 11, 12, 14—*Income Tax Act* 1842 (5 & 6 *Vict. c.* 35) *s.* 61 *No. VI.*

The exemption from income tax granted by the Income Tax Act 1842 (Sched. A s. 61 No. VI.) to any building "the property of any literary institution" includes buildings appropriated to free public libraries and used solely for the purposes of the libraries, whoever may be the owners of the buildings, and whether they are or are not supported by rates.

So *held* with regard to the Manchester free public libraries and the decision of the Court of Appeal ([1895] 1 Q. B. 673) reversed, Lord Halsbury L.C. dissenting.

THE mayor, aldermen, and citizens of the city of Manchester appealed against four assessments under Sched. A of the Income Tax Act 1842 upon the annual values of four buildings—the reference library in King Street, the free library in Every Street, the free library in Livesey Street, and the public reading-room

in Hyde Road, all in the city of Manchester, which buildings are used as free libraries for the city of Manchester, and are together with other similar buildings known as the "Manchester Public Free Libraries."

It was contended that the corporation were not liable to pay income tax in respect of these buildings, being (as they alleged) exempted under the Income Tax Act 1842 s. 61 No. VI. by which an allowance is directed to be made for the duties charged "on any building the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise; provided also that the said building be not occupied by any officer of such institution nor by any person paying rent for the same."

Each of the four buildings is used for the purpose of a public library duly established under the Public Libraries Act 1850, and formerly maintained under the Acts repealed by the Public Libraries Act 1892 and now maintained under that Act. All the requirements of the Public Libraries Acts as to their adoption or application in the city of Manchester, the purchase or appropriation of sites and buildings, the obtaining the necessary approvals and sanctions and otherwise, have been complied with in respect of each of the four buildings, and the buildings are now vested in the mayor, aldermen, and citizens as a library authority under and in pursuance of the Public Libraries Act 1892. The public libraries are under the general management of a committee appointed in pursuance of sub-s. 3 of s. 15 of the Act of 1892, and all the powers and duties of the mayor, aldermen, and citizens as the library authority under s. 15 have been delegated to the committee.

Separate accounts are kept of the receipts and expenditure under the Act of 1892 of the mayor, aldermen, and citizens as library authority and their officers, as required by s. 20 sub-s. 1 of that Act. The four buildings and the other public free libraries in the city of Manchester are maintained by a rate not exceeding the limit prescribed by s. 16 of the Manchester Corporation Act 1891, as continued by s. 29 of the Public Libraries Act 1892.

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Each of the four buildings is used solely for the purposes of a public free library. No payment is made or demanded for any instruction there afforded by lectures or otherwise. Each of the buildings is during the day in charge of a superintendent, and at night is unoccupied. None of the buildings are occupied by any officer of the mayor, aldermen, and citizens, or of the library for which the same is used, nor by any person paying rent for the same or having any allowance in lieu of rent. No payment is made to the mayor, aldermen, and citizens as library authority by any person using any of the public free libraries, and no profit whatsoever is derived by the mayor, aldermen, and citizens therefrom.

The reference library in King Street is used exclusively as a place for the consultation and reading of books, and no books are lent out. The free libraries in Every Street and Livesey Street are used as lending libraries and as places for reading of books and papers on the premises, and the public reading-room in Hyde road is a place where books, magazines, &c., are read or consulted but not lent out.

The commissioners who heard the appeal considered that the present case was not distinguishable from *Andrews* v. *Mayor and Corporation of Bristol* (1), and that the four buildings were not and that none of them was buildings or a building the property of a literary or scientific institution within the meaning of the Income Tax Act 1842, and that the mayor, aldermen, and citizens of the city of Manchester were not entitled to the allowance, and accordingly confirmed the four assessments, but stated a case for the opinion of the High Court containing the above facts.

The Queen's Bench Division (Wright and Collins JJ.) affirmed the determination of the commissioners, and this decision was affirmed by the Court of Appeal (Lindley and Rigby L.JJ., Lord Esher M.R. dissenting). (2) From these two decisions the present appeal was brought.

March 6, 9. *Lawson Walton Q.C.* and *Reginald Brown*, for the appellants. The appellants come within the definition

(1) 61 L. J. (Q.B.) 715. (2) [1895] 1 Q. B. 673.

in s. 61 No. VI. of the Income Tax Act 1842. The committee appointed in pursuance of the Public Libraries Act 1892 s. 15 sub-s. 3, as the library authority, are not the less a "literary institution" because they form part of a corporation. Municipal bodies in these days discharge many functions, and the promotion of literature is one of them. The word "institution" may be used of the organisation as well as of the owning body: *Churchwardens of Birmingham* v. *Shaw* (1); and the owning body are not the corporation, but the library authority. In urban districts there is, and in rural districts there is not, a power of delegation; if the respondents are right, the latter would, and the former would not, be entitled to the exemption. The Legislature cannot have intended such a distinction.

Next, these libraries are the "property" of the institution. The word has other meanings than that which imports ownership. It may mean "forming part of," or "appropriated to." This meaning was not suggested in *Andrews* v. *Mayor of Bristol* (2), which was followed below. If, however, the narrower meaning be given to "property," the broader interpretation should be attached to "institution." *Royal College of Surgeons* v. *Sulley* (3) is distinguishable, as the college, being only an examining body, was only indirectly a scientific institution.

[They also referred to 6 & 7 Vict. c. 36, 8 & 9 Vict. c. 43, and the Literary and Scientific Institutions Act 1854 c. 112.]

Sir R. B. Finlay S.G. and *Danckwerts*, for the respondent. The exemption only applies to the "property" of a "literary institution" used solely for the purposes of the institution.

[LORD MACNAGHTEN referred to *Commissioners of Inland Revenue* v. *Forrest.* (4)]

As this is a property tax, "property" must mean ownership, and beneficial ownership. The trustees are the legal, and the public the beneficial, owners. The exemption was never intended for the inhabitants at large, and they cannot be the institution. Nor can a corporation in this sense be called an

(1) 10 Q. B. 868.
(2) 61 L. J. (Q.B.) 715.
(3) 19 Court Sess. Cas. 4th series, 751.
(4) 15 App. Cas. 334.

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"institution." The Act clearly contemplates voluntary societies on which the tax would otherwise fall in respect of this property. The Act of 1842 is similar in its scope to 6 & 7 Vict. c. 36 s. 1, by which local rates are remitted in the case of societies devoted exclusively to science and art. An institution must embrace not only its governing body but its members, who may have individual rights of their own, and the members of this so-called institution are the whole body of ratepayers. The meaning of "institution" for which the respondent contends is that which is found in all the Library Acts, beginning with that of 1850. The *Bristol Case* (1) was rightly decided.

Lawson Walton Q.C. in reply.

The House took time for consideration.

July 31. LORD HALSBURY L.C. My Lords, I regret that I am not able to concur in the view the majority of your Lordships have taken of the statute the construction of which is in question here.

The Act takes its rise, in respect of this exemption, from Sir Robert Peel's Income Tax Act of 1842. It is quite legitimate to refer to the history of that period to understand what was the subject-matter with which the Legislature was then dealing, and a glance at the parliamentary records of that year will shew that a variety of petitions from literary and scientific institutions, so described, were presented to Parliament inviting consideration to their cases and petitioning to be exempted from the new tax. There were at that time a great many institutions so described, and I think it may be asserted that Parliament was then dealing with known institutions.

The Master of the Rolls and some of your Lordships appear to construe this exemption as if everything comprehended within its language, "literary," "scientific," and "institution," would satisfy the meaning of the Act, so as to establish the exemption. I cannot so construe it. I think in 1842 the Legislature was dealing with a known thing. It was not selecting the language which should for all time embrace any institution which was literary or scientific, or both, within the

(1) 61 L. J. (Q.B.) 715.

ambit of the exemption. What a literary institution then was was, I think, well understood and known to the Legislature, and I think the language must be construed in relation to the thing in respect of which the Legislature was acting. It may well be that a municipal corporation is an institution. It may well be that it may become both literary and scientific; but the question may still remain whether it is a literary and scientific institution within the meaning of the exemption of 1842. The mode by which a municipal institution has become literary and scientific is that by the machinery of the Free Libraries Act a municipal corporation may provide for literary and scientific development, and may make rates for the purpose. I agree with Lindley L.J. that no such thing was contemplated, and that it is a misapplication of the terms to a public library established by a municipal corporation and supported by a compulsory rate, not the less, I think, distinguishing it from the voluntary character of a literary and scientific institution such as existed in 1842, simply because the adoption of the Free Libraries Acts, and the consequent liability to rates, has to be passed by a popular vote. My Lords, I am of opinion that the exemption ought not to be allowed.

I must add that I do not understand how it can be contended, as it is by the Master of the Rolls, that we are not to construe the Act of 1842 at all. I should say, on the contrary, that that is the Act we have to construe, or its repetition in subsequent statutes, and that the Act which his Lordship says we have to construe, namely, the Free Libraries Act, is one which may be relevant enough when we have first made up our minds what the exemption is to see whether it comes within that exemption, but I think can have no operation in guiding us to the true construction of what the Legislature intended in 1842.

LORD HERSCHELL. My Lords, by the Income Tax Act allowance by way of exemption from income tax is to be made in respect of the duties charged on any building, the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made

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or demanded for any instruction there afforded by lectures or otherwise.

In 1893 the Income Tax Commissioners for the City of Manchester assessed the appellants to income tax as being the owners of buildings in that city which were used solely for the purposes of four free public libraries. The question is whether the words of exemption apply to these buildings.

The municipal borough of Manchester in 1852, upon a poll of the burgesses, duly adopted the provisions of the Public Libraries Act, 1850. That Act was repealed by the Public Libraries Act, 1855. This statute empowered a town or city council to appropriate any land for the purposes of the Act, and to erect any buildings suitable for public libraries (s. 18). It vested the general management of the libraries in the council (s. 21), and provided that lands and buildings appropriated or purchased for such purposes should be vested in the same body (s. 22). The buildings in question were provided by the corporation for use as public libraries between the years 1855 and 1892.

The Act of 1855 was repealed by the Public Libraries Act, 1892. By s. 11 of that Act it was enacted that the library authority of any library district might, subject to the provisions of the Act, provide "all or any of the following *institutions*." Amongst those mentioned are "public libraries." The corporation of Manchester is, under the same statute, the library authority; but their powers and duties have, pursuant to s. 15, been delegated to a committee of the corporation called "The Public Free Libraries Committee."

In the Queen's Bench Division the case was concluded by a previous decision of the same Court relating to a free library at Bristol: *Andrews* v. *Mayor of Bristol*. (1) In the Court of Appeal, Lindley and Rigby L.JJ. were of opinion that the appellants were not entitled to the exemption claimed; the Master of the Rolls arrived at the contrary conclusion. The learned judges who formed the majority considered that the corporation of Manchester, even in its character of library authority, could not properly be called a "literary institution."

(1) 61 L. J. (Q.B.) 715.

Lindley L.J. was of opinion, further, that a library supported by rates could not be a literary institution within the meaning of the Income Tax Act.

Apart from any question of the ownership of the buildings or of the maintenance of the libraries by a rate levied on the occupiers within the city, I do not think it was doubted that a public free library is a literary institution. Its object is to spread a knowledge and love of literature among the people. Such an institution is, in my opinion, quite aptly termed "literary." The difficulty arises from the other words used. To be exempted the building must be "the property of" a literary institution. The view taken by the majority in the Court below appears to have been that you must first ascertain who is the owner of the building in respect of which the allowance is claimed, and then whether such owner can be said to be a literary institution, and that unless that is the case the exemption is not made out. The words "the property of any literary or scientific institution" must be read together, and I cannot think that the words "property of," used in this combination, can properly be construed in the narrow sense adopted.

It may be well to consider, first, what is the meaning of the word "institutions" as used in the section. It is a word employed to express several different ideas. It is sometimes used in a sense in which the "institution" cannot be said to consist of any persons, or body of persons, who could, strictly speaking, own property. The essential idea conveyed by it in connection with such adjectives as "literary" and "scientific" is often no more than a system, scheme or arrangement, by which literature or science is promoted without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested, save in so far as these may be regarded as a part of such system, scheme, or arrangement. That is certainly a well-recognised meaning of the word. One of the definitions contained in the Imperial Dictionary is as follows: "A system, plan, or society, established either by law, or by the authority of individuals, for promoting any object, public or social." An illustration of this

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use is to be found in the Libraries Act itself. When the libraries which the authorities referred to in that Act may provide are termed "institutions" the term conveys the idea of buildings stored with books, with access to them by the public for the purpose of reading, together with the arrangements made for their use. Another illustration is seen in the Act of the 17 & 18 Vict. c. 112, the object of which is to give greater facilities for procuring sites and buildings "for institutions established for the promotion of literature, science, or the fine arts." And it is, I think, in the sense I have indicated that the word is used in the enactment under consideration. What, then, is meant when the property of "such an institution" is spoken of? No more than this, I think, that it is property appropriated to and applied for its purposes. It is not open to doubt that institutions in connection with which there is no incorporated body in whom property can vest are within the scope of the enactment. In the case of an institution of this description, any building appropriated exclusively for its use must be vested in individuals as trustees; but these trustees are certainly not the institution, nor are the individuals who manage it. Counsel were asked, What persons are in that case the institution owning the property? The answer given was, The members. But where the institution is "established for the use of the public" at large, it cannot be said to consist of any members who can be regarded as the beneficial owners of the property. No one could question that a building "conveyed to trustees for use by the public" for purposes scientific or literary was intended to be within the exemption as being the property of a literary or scientific institution. Suppose the trustees were afterwards, by arrangement with the corporation of Manchester, to convey the building to that corporation to be held for the same uses as before, would the exemption cease because they became the owners of the building, and could not properly be designated a literary or scientific institution? It seems to me impossible to arrive at such a conclusion.

It is not an uncommon use of the expression "property of" in connection with such a word as institution to employ it to describe property appropriated to the purposes of the institution.

For example, by the Act of the 17 & 18 Vict. just referred to, which by s. 33 was to apply to "every institution for the time being established for the promotion of science, literature, the fine arts, &c.," it was provided (s. 11) that where an institution is not incorporated the grant of any land for the purpose of such institution may be made to any corporation, sole or aggregate, and (s. 21) that unincorporated institutions may be sued in the name of an officer; and by s. 23 it was enacted, that if judgment be recovered against an officer on behalf of an institution, such judgment is only to be put in force against "the property of the institution." Here the words "the property of" obviously mean no more than held for, or appropriated to, the purposes of. Again, in the Charitable Trusts Act of 1853, "the property of" a charity is spoken of in more than one section.

I think, therefore, that even though the corporation of Manchester, in whom the buildings the taxation of which is now in question are vested, cannot be said to be itself a literary institution, nevertheless, the buildings being appropriated for the purpose of free public libraries, being devoted exclusively to that use and incapable of being legally applied to any other purpose, may properly be said to be the property of a literary institution.

The question remains whether a literary or scientific institution, supported by rates, is within the meaning of those words in the Income Tax Act. Lindley L.J. thought it was not. He considered that the object of exempting literary and scientific institutions from income tax was to encourage private landowners to give land or to allow it to be used by literary or scientific institutions supported by voluntary gifts or subscriptions, and so encourage such institutions, and that an institution supported by rates was not within the contemplation of the Legislature. I do not feel myself at liberty to speculate on the intention of the Legislature except in so far as it is to be discerned in the language employed. If a free public library is a literary institution, supposing it to be founded by a voluntary benefaction, even though its property be vested in and it be managed by a public corporation, I cannot see how it would become less a

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literary institution if that corporation were empowered to levy rates for its maintenance and exercised that power. I can find no words in the statute to justify, on that account, the exclusion of an institution otherwise within its terms or to warrant a restriction to institutions supported by voluntary contributions. This is not made a condition of the exemption, as it is in the rating Act of the following year. The leading object of the exemption from income tax obviously was to encourage the formation of literary and scientific institutions, because they were regarded as of public utility. I can see nothing extravagant, therefore, in a construction which would comprise such institutions, even though they be supported by municipal rates.

I move your Lordships that the judgment appealed from be reversed with costs here and in the Courts below.

LORD MACNAGHTEN. My Lords, there are, it seems, four public libraries in Manchester, which were all established some years ago, and are now vested in the corporation of that city as the library authority under the Public Libraries Act, 1892. The corporation claims to be entitled to allowances for the duties charged under Schedule A in the Income Tax Act, 1842, in respect of the library buildings. The whole question turns upon some half-dozen words in the catalogue of allowances (No. VI. in s. 61). Allowances are granted for the duties on any building "the property of any literary or scientific institution" used solely for the purposes of such institution. It is admitted that the buildings in question are used solely for library purposes, and it is admitted that if a public library is a literary institution the other conditions of exemption required by the statute are fulfilled.

The claim has been rejected by the Court of Appeal (Lindley and Rigby L.JJ.), Lord Esher M.R. dissenting. The learned judges who formed the majority of the Court rest their decision on two grounds. In the first place, they seem to consider that a public library, though a literary institution for some purposes, is not a literary institution within the meaning of the Act of 1842, because at the date of that Act there was no such thing

as a literary or scientific institution established or supported by rates. In the opinion of Lindley L.J. the object of the exemption was "to encourage private landowners to give land or allow it to be used by literary or scientific institutions supported by voluntary gifts or subscriptions, and so to encourage such institutions." There is, however, nothing in the Act of 1842 declaring or tending to shew that that particular object was in the contemplation of the Legislature. The object of the Legislature, no doubt, was to encourage, or rather perhaps to avoid discouraging, literary and scientific institutions. But it seems to me, as far as I can gather the intention of the Legislature from the language it has used, that it is the character of the institution, not the circumstances of its origin or the means by which it may be established or supported, that will give rise to a claim for exemption. In dealing with the exemption from local rates conferred upon certain literary and scientific institutions by the Act of 1843, Erle C.J., then Erle J., makes the following observation in *Bradford Library Society* v. *Churchwardens of Bradford* (1): "The Legislature, I think, intended to protect from rateability all institutions of which the object was to improve the public tone of mind; an object far more valuable than any pecuniary saving to the parish which would be attained by rating such institutions." If one is to speculate on the intention of the Legislature, the broader view indicated in that passage is, perhaps, preferable to the narrower view which has commended itself to the Court of Appeal.

It is a little difficult to define the meaning of the term "institution" in the modern acceptation of the word. It means, I suppose, an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle. Sometimes the word is used to denote merely the local habitation or the headquarters of the institution. Sometimes it comprehends everything that goes to make up the institution—everything belonging

(1) 1 E. & E. at p. 96.

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to the undertaking in connection with the purpose which informs and animates the whole. A public library may, I think, be properly called an "institution" in that sense. At any rate, public libraries are described as institutions by the Legislature itself in the Public Libraries Act 1884, and in the Act of 1892. A free public library is a literary institution above all things. It is, perhaps, the very ideal and pattern of a literary institution. The Manchester free libraries come within the words of the exemption in the Income Tax Act, 1842, and I can see no reason why they should be excluded from the benefit of that exemption. I should have been of this opinion if the Act of 1842 had been passed once and for all. But in view of the observations of the Court of Appeal it is not, perhaps, immaterial to notice that the Act was only a temporary Act. It has been revived and re-enacted over and over again, and certainly more than once or twice since the Legislature applied the term "institution" to a public library.

The other ground on which the majority of the Court of Appeal proceeds is that a municipal corporation is not a literary institution. I must confess that it never would have occurred to me that the contrary of that proposition could be gravely maintained. But it seems to have been so argued in the Court of Appeal, and argued in such a serious way that it is the only point dealt with in the judgment of the majority of the Court other than the point which has been already discussed.

Assuming that a public library is a literary institution, are the library buildings the "property" of the institution? What is the meaning of the word "property" in that connection? Does it import legal ownership, or does it mean that the buildings are the property of the institution in the sense that they are appropriated to the purposes of the institution—that they are not only used for the purpose of the institution, but that they cannot be used or applied legally for any other purpose? Rigby L.J. observes (1) that "the terms of the exemption granted by the Income Tax Act, 1842, have relation not merely to the purpose to which the building is applied, but also to the position and character of the owners of the building."

(1) [1895] 1 Q. B., at p. 679.

We have, therefore, he adds, "to consider not merely the character of the building itself, and the purposes for which it is used, but also the position and character of the owners of the building, as distinct from the building itself." I cannot find anything of that sort in the Act. The buildings, no doubt, are vested in the corporation, but merely for a special purpose. I cannot see that it matters in the very least who the trustees are, or what may be their position or character, or in whom the legal ownership of the buildings is vested, provided the buildings themselves are legally appropriated to the purposes of the institution. That seems to follow from a consideration of the circumstances which existed when the Act of 1842 was passed. At the date of that Act there were, no doubt, some literary and scientific institutions incorporated by charter or statute. But certainly such institutions were usually unincorporated. So it would appear from the numerous reported cases relating to literary and scientific institutions, and from the provisions of the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112). If the majority of the Court of Appeal is right, all unincorporated institutions must be excluded from the benefit of the exemption in the Income Tax Act, 1842. It is impossible to suppose that this could have been the intention of Parliament. It seems to me, therefore, that the word "property" in the exemption in question cannot import legal ownership. It imports the right of possession and exclusive enjoyment. Moreover, that is the ordinary meaning of the term. The word "property" is not a technical expression. No one in ordinary language would speak of land or buildings vested in a trustee and in which the trustee has no beneficial interest as his "property." I may observe that if your Lordships will turn to the Act of 1854, to which I have just referred, you will find the very expression, "property of the institution," used in more than one place to denote real and personal property held on trust for the purposes of the institution, though not legally vested in the institution itself.

I am therefore of opinion that the judgment of the Master of the Rolls is right, and that the appeal should be allowed with costs.

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LORD MORRIS. My Lords, I have read the judgments which my noble and learned friends opposite (Lord Herschell and Lord Macnaghten) have just delivered, and I concur in them.

Orders appealed from reversed with costs here and below; the appeal to the Income Tax Commissioners allowed; cause remitted to the Queen's Bench Division.

Lords' Journals, July 31, 1896.

Solicitors for appellants: *Austin & Austin, for Town Clerk, Manchester.*

Solicitor for respondent: *F. C. Gore, Solicitor of Inland Revenue.*

Applied. HESKELL *v.* CONTINENTAL EXPRESS, LTD. [1950] 1 All E.R. 1033.

H. L. (E.) 1896 — *July* 31.

SCHOLFIELD . . . . . APPELLANT;

AND

THE EARL OF LONDESBOROUGH . . RESPONDENT.

Bill of Exchange—Fraudulent Alteration—Accepting Bill which gives Facilities for Alteration—Negligence—Stamp of larger amount than necessary—Estoppel—Bills of Exchange Act 1882 (45 & 46 *Vict. c.* 61) *s.* 64.

The acceptor of a bill of exchange is not under a duty to take precautions against fraudulent alterations in the bill after acceptance.

A bill for 500*l.* was presented for acceptance with a stamp of much larger amount than was necessary and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned it into a bill for 3500*l.* Being sued on the bill by a bonâ fide holder for value the acceptor paid 500*l.* into court:—

Held, affirming the decisions of Charles J. ([1894] 2 Q. B. 660) and of the Court of Appeal ([1895] 1 Q. B. 536), that the acceptor owed no duty of precaution to the plaintiff, and was guilty of no negligence, and was entitled to judgment.

Young v. *Grote* (4 Bing. 253) commented on.

THE following statement of facts is taken from the judgment of Lord Watson.

The appellant brought an action against the respondent upon a bill of exchange purporting to be for 3500*l.*, payable three

months after date. The bill was written out by Scott Sanders, the drawer, for the sum of 500*l.*, on a 2*l.* stamp; and, in that condition, was presented by him to the respondent, who accepted it. After acceptance, the drawer fraudulently increased its amount by inserting the figure "3" between the letter "£" and the figures "500," in the corner of the bill, by writing the word "three" at the end of the second line, and by writing the word "thousand" at the beginning of the third line before the words "five hundred" in the body of the bill. It is now obvious that Scott Sanders, when he wrote the bill, must have had in contemplation the alterations which he subsequently made, and that he purposely used a stamp of unnecessary value, and left the spaces which he afterwards filled up as above described, in order to facilitate his fraud. The altered bill was indorsed by Scott Sanders to one Scott, from whom the appellant acquired it in good faith and for value. In his defence to the action, the respondent, while denying all liability, paid into court the original amount of 500*l.* Charles J., before whom the action was tried without a jury, gave judgment for the defendant upon the grounds appearing in the report below. (1) This decision was affirmed by the majority of the Court of Appeal (Lord Esher M.R. and Rigby L.J., Lopes L.J. dissenting) upon other grounds. (2) From these decisions the plaintiff brought the present appeal.

1895. Nov. 26, 28, 29. *Asquith Q.C.* and *E. Morten* for the appellant. The questions are: (1.) Is there a duty incumbent on the acceptor with respect to subsequent holders for value, and apart from contract with the drawer, to see that the bill is not in such a form as to invite or facilitate such fraudulent alterations as would mislead a holder? (2.) Was there a breach of that duty in the present case? (3.) If so, was the breach the proximate cause of the plaintiff's being misled? If the answer to these questions be in the affirmative the appellant is entitled to succeed. A bill is not like a deed or contract intended only to operate between the parties, but is by nature negotiable, and becomes, as Williams J. said in *Ingham* v.

(1) [1894] 2 Q. B. 660. (2) [1895] 1 Q. B. 536.

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Primrose (1), "part of the mercantile currency." To say that the proximate cause of the appellant's loss is not the form of the instrument but the criminal act of Sanders, is only in another form to deny the existence of the duty. The earliest authority seems to be *Young* v. *Grote* (2), which was a case of alteration in a cheque. The decision is not clear and defines the duty only as between banker and customer, but it has been approved on various grounds by many judges. In *Robarts* v. *Tucker* (3) Parke B. treats it as the case of a blank cheque left for any person in whose hands it was to fill up in whatever way the blank permitted. In *Bank of Ireland* v. *Trustees of Evans' Charities* (4) Lord Cranworth L.C., who approved the decision, placed it upon estoppel. *Ingham* v. *Primrose* (1), which was a very strong case, was based on negligence. The bill had been torn in two by the acceptor and the pieces were picked up and joined together and the bill sold. It was held that the acceptor and not the holder for value without notice must suffer. The ground of decision was the duty of the acceptor to innocent holders for value of instruments issued by the acceptor which have become part of the mercantile currency. In *Ex parte Swan* (5) the principle of estoppel and of the law merchant was admitted to be applicable to cases like *Young* v. *Grote*. (2) In *Swan* v. *North British Australasian Co.* (6), *Young* v. *Grote* (2) was approved by Blackburn J. upon the broader ground, apparently supported by the passage from Pothier there quoted, of the duty of those who put bills of exchange in circulation to take reasonable precautions against the possibility of fraudulent alterations; and by Cockburn C.J. virtually on the ground of negligence. In reference to this case Cleasby B., in *Halifax Union* v. *Wheelwright* (7), after discussing the various reasons assigned for the decision in *Young* v. *Grote* (2), observed: "But these various reasons for the conclusion only shew how incontestable the conclusion itself is." In *Arnold* v. *Cheque Bank* (8) Coleridge C.J.

(1) 7 C. B. (N.S.) 82, 85.
(2) 4 Bing. 253.
(3) 16 Q. B. 560, 579.
(4) 5 H. L. C. 389, 413.
(5) 7 C. B. (N.S.) 400.
(6) 2 H. & C. 175.
(7) L. R. 10 Ex. 183, 192.
(8) 1 C. P. D. 578, 587.

approves *Young* v. *Grote* (1) on the authority of Pothier, and also the language of Blackburn J. in *Swan* v. *North British Australasian Co.* (2) that negligence in order to estop must be negligence in the transaction itself and be the proximate cause of the loss, and must be the neglect of some duty owing either to the person who has been misled or to the general public. In *Baxendale* v. *Bennett* (3) Brett L.J. first shewed his hostility to *Young* v. *Grote* (1); but that was a widely different case.

[LORD DAVEY referred to *Colonial Bank* v. *Cady*. (4)]

Merchants of the Staple v. *Bank of England* (5) reiterates the principle that the negligence must be in the transaction itself and the proximate cause of the loss. In *Bank of England* v. *Vagliano* (6) the principle is involved that the person who puts a bill of exchange in circulation is the person liable for loss caused by his negligence: see per Lord Herschell. (7) All the reasons assigned in these cases in support of *Young* v. *Grote* (1) are applicable here. There was negligence in the transaction itself, which was the proximate, or as Lord Esher M.R. preferred in *Seton* v. *Lafone* (8) to express it, the "real" cause of the appellant's being misled; the negligence was the breach of the duty, defined by Pothier and recognised by several judges, which is incumbent on makers of negotiable instruments, and the respondent is estopped from setting up the fraud. The principle of estoppel has been recognised by all the judges who have discussed *Young* v. *Grote*. (1) The standard of the prudent man is that to which the law expects a man to conform in business transactions.

[They also discussed *Carr* v. *London and North Western Ry. Co.* (9); *Seton* v. *Lafone* (10); *Heaven* v. *Pender* (11); *Garrard* v. *Haddan* (12); Story's Equity Jurisprudence, s. 387; *Pagan* v. *Wylie*. (13)]

(1) 4 Bing. 253.
(2) 2 H. & C. 175.
(3) 3 Q. B. D. 525, 534.
(4) 15 App. Cas. 267.
(5) 21 Q. B. D. 160.
(6) [1891] A. C. 107.
(7) [1891] A. C. 107, at p. 151.
(8) 19 Q. B. D. 68, 71.
(9) L. R. 10 C. P. 307.
(10) 19 Q. B. D. 68.
(11) 11 Q. B. D. 503.
(12) 67 Pennsylvania Rep. (17 Smith) 82.
(13) 1 Ross, Leading Cases on Commercial Law, 194.

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Jelf Q.C. and *A. T. Lawrence* (*C. K. Francis* with them) for the respondent. By the general law, estoppel could only be founded on such negligence as was by itself actionable: *Freeman* v. *Cooke*. (1) But by the Bills of Exchange Act 1882 its operation is defined and narrowed by s. 54, by which the acceptor is "precluded" (i.e. estopped) "from denying" the things there mentioned, and those only. The Act is a code and exhaustive, and s. 64 deals with alterations in a bill and provides that when the bill is materially altered, it is avoided against all parties to it except such as have made or authorized the alteration.

Sect. 97 says the rules of common law including the law merchant shall continue to apply to bills. In *Goodwin* v. *Robarts* (2) Cockburn C.J. defines the "law merchant" as "neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law." There is no evidence of such usage or ratification as would support the appellant. *Young* v. *Grote* (3), which has been taken to embody the law merchant on this subject, has been misunderstood and the passage from Pothier, there cited, misapplied. By many judges that case has been treated simply as one of a blank cheque, the drawer of which gave his bankers authority to pay the amount, whatever it was, which was filled in. There was here no such authority express or implied. Estoppel can only be applied in cases of actionable negligence, which exists where as in case of a blank cheque there is implied authority, but not in a case like this. "Bill of exchange" is not synonymous with "acceptance." See definition in the Act s. 3. A cheque is a bill of exchange, but is never "accepted." In this case the maker was the drawer. If there be such a duty as is alleged, on whom is the duty incumbent? On the acceptor only, or also on the drawer and the indorsers? If on all these, what a dangerous extension of liability is opened out. There is no limit to the possibility of fraudulent alteration. The passage from Pothier only relates to banker and customer; and neither *Young* v. *Grote* (3) nor that passage

(1) 2 Ex. 654, per Parke B., at p. 659.

(2) L. R. 10 Ex. 337, 346.

(3) 4 Bing. 253.

gives any warrant for imposing such a liability as is contended for, not only on the acceptor, but on every indorser. If the appellant succeeds an intolerable burden will be placed on the commercial community. Not only bills of exchange, but every conveyance, deed or other document is exposed to the peril of fraudulent alteration. As Bowen L.J. observed in *Le Lievre* v. *Gould* (1) "The law of England . . . . does not consider that what a man writes on paper is like a gun or other dangerous instrument: unless he intended to deceive the law does not in the absence of contract hold him responsible for drawing his certificate carelessly"—or in this case for the careless drawing of a bill. The duty which it is sought to impose does not exist, and there can be no negligence without neglect of some duty: per Brett L.J. in *Patent Safety Gun Cotton Co.* v. *Wilson*. (2) In this case as in that there was no relation between the plaintiff and the defendant which could cause any duty to exist. There was no duty on the respondent except the general duty incumbent on all persons to prevent crime; but such duty has no application here. The very same point now in question was decided in favour of the acceptor in *Adelphi Bank* v. *Edwards*. (3) The proposition that when one of two innocent persons must suffer, it ought to be the one who by his own acts occasioned the confidence and the loss, is too wide to be universally accepted. In *Baxendale* v. *Bennett* (4) the acceptor was held not liable. In *Bank of England* v. *Vagliano* (5) Lord Herschell says: "The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals." There is nothing beyond dicta in the cases cited for the appellant. The Pennsylvania case cited is of no authority, and the law in that State differs from that of others in the Union. The American cases are collected in Beven on Negligence, 2nd ed. "Estoppel," p. 1565. The principal cases are *Holmes* v. *Trumper* (6); *Wood* v.

(1) [1893] 1 Q. B. 491, 502.
(2) 49 L. J. (Q.B.) 713.
(3) 26 Sol. J. (1882) 360.
(4) 3 Q. B. D. 525.
(5) [1891] A. C. at p. 148.
(6) 7 Amer. Rep. 661.

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Steele (1); *Angle* v. *North Western Mutual Life Insurance Co.* (2)

Further, the stamp for 2*l.*, although excessive for 500*l.*, was exhausted as soon as the bill was drawn for that amount; and when altered the bill became a new one and required a fresh stamp. *Downes* v. *Richardson* (3), deciding that an accommodation bill altered before issue does not require a fresh stamp, and that it is not "issued" until it reaches the hands of some person who is entitled to treat it as a security available at law, is no longer an authority. The definition of "issue" in the Act of 1882 is "the first delivery of a bill or note complete in form to a person who takes it as a holder." Thus this bill was issued as soon as it was accepted and handed to the drawer.

[They also cited *Master* v. *Miller* (4); *Russel* v. *Langstaffe* (5); *Société Générale* v. *Metropolitan Bank.* (6)]

Asquith Q.C. in reply. The alteration does not avoid the bill, as in this case the alteration was not apparent: s. 64 of the Act of 1882. That Act was clearly not regarded by its framers as a complete code, as by s. 97 the rules of the common law—including of course, estoppel—are expressly preserved.

As to the stamp, see the Stamp Act 1870 ss. 53, 54. The statutory definition of "issue" in s. 2 of the Act of 1882 cannot be imported into or affect the Act of 1870. *Downes* v. *Richardson* (3) has never been doubted. All the judges have accepted the principle of estoppel, and most of them have treated *Young* v. *Grote* (7) as based on that principle. In a business transaction business precautions ought to be taken and enforced.

The House took time for consideration.

July 31. LORD HALSBURY L.C. My Lords, in this case the plaintiff below (the appellant here) brought an action

(1) 6 Wallace, 80.
(2) 2 Otto (92 U.S.) 330.
(3) 5 B. & Ald. 674.
(4) 4 T. R. 320; 5 T. R. 367; affirmed in Ex. Cham. 2 H. Bl. 141; 1 Anst. 225.
(5) 2 Douglas, 514.
(6) 27 L. T. (N.S.) 849.
(7) 4 Bing. 253.

against the respondent on what purported to be a bill of exchange for 3500*l*. The respondent's name attached to the bill in question was genuine. He had, in fact, accepted a bill for 500*l*., but by fraudulent alteration, amounting to forgery, the amount for which the respondent accepted was increased to the sum sued for.

It is not contended that the bill is not a forgery, and if nothing else appeared it would, of course, be a sufficient defence for the acceptor to plead and prove that he never accepted any such bill as that for which the plaintiff brought his action. But it is contended that the form of the bill was such that the respondent was negligent in accepting it.

The bill as originally accepted was so far in ordinary form and perfect that but for some criminal act it was, in its then form, a complete bill of exchange, leaving nothing to be added to or taken from it. It is said, indeed, that certain spaces were left which gave opportunity for the insertion of the added words and figures, and if by that is meant that the words and figures were not written so closely together as to prevent the insertion of other words and figures, the observation is true. But when it is said that certain spaces were left, it is to be remembered that there was nothing unusual or calculated to excite attention in the intervals between the written words and figures by which the bill was made. As a matter of fact, the person who drew the bill intended to draw it in such a way as to enable him to fill up the intervals between the letters and figures in question; but, to my mind, there was nothing suspicious in the appearance of the bill when tendered to the respondent for acceptance.

I cannot myself understand why the particular form of fraud adopted in this case should have any different operation in giving validity to a forged instrument rather than other forms of fraud to which instruments are subject. I am not aware of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime.

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A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket-handkerchief to hang out of his pocket, but could recover against a bonâ fide purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt could be retained by a bonâ fide purchaser for value, notwithstanding they had been previously stolen; but the same result would follow equally whether the owner had been careful or careless in the custody of his goods.

The truth is that the whole doctrine, that facilitating forgery, or giving opportunity for forgery, or so acting that a forgery is a possible result, affects the validity of the instrument forged, may be traced in English law, at all events, to the case of *Young* v. *Grote* (1), and probably beyond, to certain doctrines of the civil law, which, to my mind, form no part of the law merchant so far as it exists in English jurisprudence.

That case has been pushed so far in argument that I think the time has come when it would be desirable for your Lordships to deal with it authoritatively, and to examine how far it ought to be quoted as an authority for anything.

It is to be observed that when one looks at the judgments delivered there is an inextricable confusion, not only among the different judges, but in the judgment of each judge in turn. Best C.J. says: "If Young, instead of leaving the cheque with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up." So that here the negligence is made to consist, so far as the drawer was concerned, in leaving a cheque, already signed in blank, with a female unacquainted with business, and in accordance with this view the learned judge goes on to distinguish *Hall* v. *Fuller* (2), because, he says, the alteration in that case was not made by the drawer's clerk nor a person improperly trusted by him, but by an entire stranger who accidentally became possessed of the cheque.

Park J., again distinguishing *Hall* v. *Fuller* (2), says: "Can any one say that the cheque signed by Young is not a genuine

(1) 4 Bing. 253. (2) 5 B. & C. 750.

order? I say it is. The cheques left by him to be filled up by his wife when filled up by her become his genuine orders." This is an intelligible ground; but the learned judge immediately adds that the arbitrator had found negligence on the part of the drawer, and he says he concurs, and then goes on: "He leaves blank cheques in the hands of his wife, who was ignorant of business, but having left them with her to be filled up as the exigency of the moment might require, they become upon her issuing them his genuine orders." It is manifest that the learned judge oscillates between the two views. In the perfectly sound view upon which he decides in the defendant's favour he adds the absolutely irrelevant statement that the cheques were left in the hands of the wife, who was ignorant of business.

Burrough J. seems only to deal with the question of negligence, and says the blame is all on one side; while Gaselee J. points out the circumstances negativing the general authority of the clerk, who was the actual forger, either to fill up cheques or to receive money from the bank: these circumstances, he says, might have strengthened the case.

It is not very surprising that a variety of reasons have been given by various judges for not disagreeing with the case. The arbitrator had decided that there was negligence, and Park J., as is apparent, puts forward, and justly puts forward, the argument that by the act of the drawer's wife that cheque became the husband's genuine order. Shortly put, the argument is that he attached his genuine signature, leaving it to be filled up by his wife, and, as the learned judge emphatically says, "when filled up by his wife they become his genuine orders." If that is a true view of the case—and that is the learned judge's reasoning—it could not be doubted but that it was the drawer's genuine order.

My Lords, I am not concerned to discuss whether the particular mode in which a written order which was given by the banker to his customers for the purpose of being filled up in the usual way before signing it may afford ground for saying that the banker was misled by his own customer. If, to use Lord Cranworth's phraseology, the customer by any act of his

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has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled.

I do not say that had I been the arbitrator I could have agreed that there was in the particular case any such neglect as would have come up to this proposition; but the principle, as Lord Cranworth says, is a familiar one, though it may not have been properly applied to the then state of facts. Your Lordships have acted upon it in *Ireland* v. *Livingston* (1) and in *Bank of England* v. *Vagliano* (2), and the minuteness with which the arbitrator described the printed forms of drafts which were supplied by the bankers to their customers indicates what was in his mind as to what I will describe as an agreed or assumed course of business between banker and customer, and under those circumstances the finding of negligence which was conclusive upon the Court might have justified it in assuming that the facts brought it up for the proposition which Lord Cranworth suggests; but, unfortunately, I think Best C.J. adopted the argument presented to him that Pothier might be quoted as an authority decisive of the case; and I think some of the confusion that has arisen upon the frequent occasions when the case has been quoted has resulted from a misapplication of what Pothier in fact has said, and the more serious assumption that what he has said forms any part of the mercantile law of England.

Now Pothier, in his Treatise on Bills of Exchange, and commenting on Scacchia, a Roman lawyer of the seventeenth century, gives a variety of illustrations, sometimes adopting and sometimes modifying the rules which Scacchia lays down. But I think it is impossible adequately to deal with the matter without having both the text and the commentary before us. They are as follows (Scacciæ, Tract. de Commer., pp. 390, 391):—

"Summaria.

"Falsificatis litteris cambii ab eo, cui litteræ illæ solui

(1) L. R. 5 H. L. 395. (2) [1891] A. C. 107.

debent; et proinde, soluta maiori summa, cuius sit damnum. n. 393 et seqq.

"Falsificationis vitium aliquando est patens, sub nu. 393 vers. primus, et n. 394. Et quandoque latens. n. 395.

"Bancherii debent esse cauti in solutionibus cædularum &c. n. 397.

"Falsificatio litterarum cambii raro posset hodie contingere. n. 399.

"Quæro XV. Tu in civitate Genuæ das Viuiano scutos 100 ut eorum valorem faciat solui Petro Romæ, Viuianus, ut moris est, facit & dat tibi litteras apertas, soluendas Petro Romæ à Bergonzo; tu litteris acceptis, mittis eas Romam ad Petrum, qui eas Romæ falsificat in numero, & illis falsificatis, exigit à Bergonzo maiorem pecuniarum summam, puta scutos 200, faciendo litteram 2 ex littera 1 vel aliter ex litteris C. litteram O.

"Dubitatur, an hoc damnum pati debeat Bergonzus quia male soluerit, vel Viuianus, quia non cautelate scripserit characteres, vel tu, quia elegeris malum virum ad exigendum, & sic ad quem ex his spectet hoc periculum?

"Pro resolutione distinguo in primis duos casus falsificationis, seu vitiationis litterarum.

"Primus casus est, quando falsificatio seu vitium litterarum est ita patens & evidens, ut à quolibet campsore, qui accurata, & debita uteretur diligentia, cognosceretur, & isto casu concludo, quod periculum pertinet ad Bergonzum, qui malè soluit; & ratio est, quia ipse soluendo illas litteras falsas, fuit in culpa, cum teneretur inquirere veritatem, & sua culpa sibi et non aliis debet nocere (*Ang. cons.* 370 *creditor, sub n.* 1 *vers. pro hoc adduco ibi, sed si falsific. & in fine consilii. quem sequitur Foll. ad Maran. in spec., par.* 6, *Act.* 6, *n.* 54 *vers. sed nunquid campsor. fol.* 387).

"Exemplifica istum casum, quando ex comparatione litterarum, adhibito peritorum iudicio, cognosci potuisset falsificatio (Ang. ubi sup.) vel quando appareret aliqua rasura, seu aliud vitium visibile, & demum esset in culpa, quoties in litteris esset tale quid quod ipsas redderet suspectas de falso, quia paria sunt, civiliter loquendo, litteras esse falsas, vel esse suspectas de

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falso ut secutus sum *in meo trac. de iudic. caus., &c., lib.* 2, *cap. ii., n.* 165, præsertim in futura impressione.

"Secundus casus est, quando falsificatio erat ita latens, ut etiam à perito & diligenti campsore cognosci non potuisset, quia nulla præ se ferebat suspicionem; & isto casu concludo contrarium; nempe periculum non pertinere ad Bergonzum, quia solvendo, non fuit in aliqua culpa & consequenter recte solvendo, est liberatus, tam à Viuiano, qui scripsit quam à te, qui es creditor (*Ang. d. cons.*, 370, *sub num.* 1, *ibi, sed si culpa campsori nulla &c., et sub n.* 2, *in fine consilii, vers. concludo igitur, et Foller. ubi supra*).

"Declara, huius secundi casus conclusionem esse veram, quando mercator scripsit litteras & sic supposita substantia negotii; secus quando mercator nullas scripsisset litteras, quia tunc licet aliquis ita mercatoris manum contrafecisset, i.e. imitatus esset, ut nullus peritus potuisset cognoscere diversitatem manus, i.e. litterarum, & consequenter nulla posset attribui culpa, desidia, negligentia, seu inexperientia ipsi campsori, quia quilibet fuisset deceptus tamen adhuc damnum erit ipsius solius: & ratio est, quia si mercator secum in hoc non contraxit, periculum remanet ipsi soli campsori.

"Infero ex hac declaratione, quod Bancherii, seu nummularii debent esse cauti in scripturis, & subscriptionibus cedularum, & illarum recognitionibus, quia si soluerint pecuniam cum cedulis, seu apochis falsis, quæ eis præsentantur, & quas ipsi veras præsupponunt, quando soluunt, coguntur iterum soluere veris dominis pecuniarum, quia male soluerunt. *Vinc. de Franchi dec.* 304, *sæpe sæpius*, dicens, sæpe sæpius id euenire in Civitate Neapolis.

"Supposito nunc isto Secundo casu, quod Bergonzus rectè solverit, superest, ut absolvendo propositam quæstionem videamus, an Viuianus qui scripsit litteras, teneatur facere novas litteras solvendas; vel tu, qui fuisti in mala electione mandatarii, habeas solum regressum contra Petrum, cessa tibi condictione furtiva à Bergonzo?

"Et agendo breviter, concludo Viuianum esse liberatum; ideo non teneri ad alias litteras, & tibi cedendam esse condictionem furtivam, quia omnis culpa quæ posset adscribi

Viuiano, quòd scripserit litteras, seu caracteres culposos, tollitur ex quo tu habuisti illas litteras apertas, & acquievisti, cum deberes potius non acquiescendo, facere scribi litteras caracteribus bene compositis ut variari non possent, ut concludit *Ang. d. consil.* 470, *sub n.* 1 *vers. Secunda culpa & sub n.* 2.

"Sed casus huius quaestionis hodie raro potest contingere, tum quia campsores non solet cambire, nisi per illas partes, in quibus adsunt publici tabellarii, et ideo ultra litteras cambii mittunt litteras *d'aviso*, quas habes, supra q. 5, nu. 78, et mercatores, nisi habeant litteras *d'aviso*, non soluunt, et in illis litteris *d'aviso*, stat veritas incorrupta, tum quia campsores sagaces hodie substantialia litterarum scribunt ita per extensum, ut falsificari non possint, sine euidenti, et notoria falsificatione."

Pothier, Contrat de Change: Part I. ch. 4, s. 99; vol. iv., ed. Bugnet, pp. 516–518.

"99. Scacchia, Tract. de Comm., § 2, gl. 5, quæst. 15, propose cette question:

"Le porteur de la lettre de change l'a falsifiée, et a écrit une plus grande somme que celle portée par la lettre; la falsification est faite de manière qu'elle peut tromper une personne attentive et intelligente. Le banquier qui, trompé par la falsification de la lettre qui lui a été présentée, a payé au porteur la somme entière qui paraissait portée par la lettre, aura-t-il la répétition contre le tireur, son mandant, de ce qu'il a payé de plus que la somme qui était effectivement et véritablement portée par la lettre?

"Scacchia décide pour l'affirmative. On peut dire pour son opinion, que, selon les règles du contrat de mandat, le mandant s'oblige à rembourser le mandataire de tous les déboursés auxquels le mandat aura donné lieu, pourvu que le mandataire n'ait pas par sa faute déboursé plus qu'il ne fallait: *Mandator debet refundere mandatario quidquid ei inculpabiliter abest ex causâ mandati*, comme nous l'avons établi en Pand. Justin., tit. Mand., No. 53 *et seq.* Or, le paiement qu'a fait le banquier de la somme entière qui, par la falsification de la lettre, paraissait être portée dans la lettre qu'on lui a présentée, est un déboursé auquel le mandat du tireur a donné lieu; et l'on ne

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peut en cela reprocher aucune faute à ce banquier (1), puisqu'on suppose que la falsification était telle qu'elle pouvait surprendre un homme intelligent; le tireur ne peut donc pas se dispenser de rembourser le banquier sur qui il a tiré la lettre, de la somme entière qu'il a payée; sauf au tireur à exercer l'action du banquier, *condictionem indebiti*, contre le porteur de la lettre, pour la répétition de ce qu'il a reçu du plus que la somme qui était véritablement portée par la lettre. Si ce porteur de la lettre est un homme insolvable, c'est le tireur qui doit souffrir de cette insolvabilité, puisque son mandataire n'est pas en faute.

"On peut dire, au contraire, en faveur du tireur, qu'il ne faut pas confondre ce qu'il en a coûté au mandataire pour l'exécution du mandat, *ex causâ mandati*, avec ce qu'il lui en a coûté à l'occasion du mandat, *non ex causâ mandati, sed tantum occasione mandati*. Ce qu'il en coûte *ex causâ mandati*, est tout ce qui tend à l'exécution du mandat. Par exemple, si je vous ai chargé d'aller visiter une terre que je voulais acquérir, les frais de voyage, les salaires que vous avez payés aux ouvriers dont vous vous êtes fait assister, et autres choses semblables, sont des déboursés qui tendaient à l'exécution du mandat dont je vous ai chargé, et qui sont faits *ex causâ mandati*: ce n'est que de ces choses que je suis censé, par le contrat de mandat intervenu entre nous, m'être obligé de vous rembourser. Mais si vous avez été attaqué en chemin par des voleurs qui vous ont volé, je ne suis pas obligé de vous indemniser de cette perte; car, quoique ce soit à l'occasion de mon mandat dont vous vous êtes chargé, que vous l'avez soufferte, et que vous ne l'eussiez pas soufferte sans cela, néanmoins ce n'est pas pour *l'exécution de mon mandat*, mais seulement *à l'occasion de ce mandat*, qu'il vous en coûte ce qu'on vous a volé; c'est par un cas fortuit, dont on ne peut pas dire que j'aie voulu m'obliger de vous indemniser, puisqu'il n'a pas même été prévu; *Non omnia quæ impensurus non fuit, mandatori imputabit; veluti quod spoliatus sit à latronibus . . . . nam hæc magis casibus quam mandato imputari oportet; L.* 26 § 6, *Mandat.*

(1) "Non, sans doute, mais il a été victime d'une fraude." [This and the following French notes are, as pointed out by the Lord Chancellor, added by Pothier's editor Bugnet.]

"Ces principes s'appliquent naturellement à l'espèce proposée. Lorsque le banquier sur qui j'ai tiré une lettre de change de 100 livres, trompé par la falsification de la lettre, paie 300 livres au porteur de la lettre, le paiement qu'il a fait de la somme de 200 livres de plus qu'il n'est porté par la lettre, n'est pas un paiement qu'il fasse *ex causâ mandati*, en exécution du mandat dont je l'ai chargé; on peut seulement dire qu'il l'a fait *à l'occasion du mandat;* la falsification de la lettre qui l'a induit en erreur, et qui lui a causé la perte de la somme qu'il a indûment payée, est un cas fortuit, qui n'a ni été ni pu être prévu, et dont on ne peut dire par conséquent, que j'aie voulu me charger de le dédommager.

"100. Cependant si c'était par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications, *putà*, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté un zéro, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur, par sa faute, a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de Scacchia. (1)

"La distinction que nous faisons entre le cas auquel un mandataire a souffert quelque dommage à l'occasion du mandat, sans qu'il y eût eu aucune faute de la part du mandant, et celui auquel le mandant a donné occasion au dommage par sa faute, est fondée sur des textes de droit.

"Paul, en la loi 26, §. 7, ff. *Mandat.*, décide que, si je vous ai chargé de m'acheter un certain esclave, et que cet esclave, après que vous l'avez acheté, et avant que vous me l'ayez envoyé, vous a volé, je suis obligé de vous indemniser de cette perte que vous avez soufferte à l'occasion du mandat, dans le cas auquel j'aurais connu cet esclave pour être un voleur; parce que, dans ce cas, je suis en faute de ne vous en avoir pas averti; mais que, hors ce cas, je ne suis point obligé de vous indemniser du vol que vous avez souffert à l'occasion du mandat, mais seulement de vous abandonner l'esclave pour

(1) "Pourquoi cette distinction; si la lettre de change dans laquelle la somme est énoncée en chiffres est valable, il n'y a aucune faute reprochable à celui qui l'a ainsi créée; la raison de décider reste la même."

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le vol, de même que j'y serais obligé envers tout autre auquel il aurait fait quelque vol ou causé quelque dommage.

"Il est vrai qu'Africain, en la loi 61, *alias* 63, §. 5 ff. *de Furtis*, décide que vous êtes tenu de m'indemniser du vol, même dans la cas auquel vous n'auriez pas eu connaissance que cet esclave était voleur, *etiamsi ignoraveritis qui certum hominem emï mandaverit furem esse, nihilominus tamen damnum decidere cogetur.* . . . Mais c'est qu'Africain pensait que, même en ce cas, c'était la faute du mandant qui avait donné lieu au dommage qu'avait souffert le mandataire, et que le mandant était en faute de ne s'être pas informé des mœurs de l'esclave dont il avait chargé son mandataire de faire l'emplète; *nam certé*, dit-il, *mandantis culpam esse qui talem servum emi sibi mandaverit.*

"C'est donc à ce cas auquel le dommage, souffert pas le mandataire à l'occasion du mandat, pourrait être attribué à quelque faute du mandant, qu'on doit restreindre tout ce qui est dit dans cette loi: *Justissime procuratorem allegare, non fuisse se id damnum passurum si mandatum non suscepisset;* et plus bas: *Æquius esse, nemini officium suum (quod ejus cum quo contraxerit, non etiam sui commodi causâ suscepit) damnosum esse.*

"Lorsque c'est la faute du mandataire qui a donné lieu au dommage qu'il a souffert à l'occasion du mandat, il n'est pas douteux qu'il ne peut pas demander à en être indemnisé; ead. l. 6, s. 7.

"101. Il résulte de tout ceci qu'on ne doit pas décider indistinctement que le tireur doive indemniser le banquier de la perte que lui a causée l'erreur en laquelle l'a induit la falsification de la lettre, et qu'on doit décider, au contraire, que le tireur n'est tenu de cette indemnité que dans le cas auquel, par quelque faute de sa part ou par celle de son facteur, il aurait donné lieu à cette falsification, faute d'avoir, en écrivant la lettre, pris les précautions qu'il pouvait prendre pour la prévenir. (1)

"Dans le cas même où le mandant n'aurait pas eu le soin de

(1) "Comment rendre le tireur de bonne foi, responsable d'un fait qui lui est absolument étranger et auquel il n'a pu participer en rien; il serait d'ailleurs impossible de préciser les précautions qu'il y aurait à prendre. Il s'agit d'une fraude commise par un tiers au préjudice du tiré, après que la lettre de change a été mise en circulation."

prendre ces précautions, le mandataire ne pourra pas répéter du tireur ce qu'il a payé de plus que la somme qui était véritablement portée par la lettre, si la falsification pouvait s'apercevoir avec quelque attention ; car, en ce cas c'est la faute du banquier de n'avoir pas bien examiné la lettre qui lui a été présentée ; et il n'est pas recevable, suivant les principes ci-dessus, à l'indemnité d'une perte à laquelle il a donné lieu par sa faute."

My Lords, I do not myself think that either the original by Scacchia or the commentary by Pothier are relevant to the matter in hand. We are not dealing here with either "mandant" or "mandatory," and I do not think that it is part of the commercial law of England howsoever applied ; and before accepting the modified doctrine of Pothier it is well to see what that doctrine is.

That learned author, who gives the case of the forger who has added a cipher to the sum written in figures, and gives it expressly as an example illustrative of his principle, proceeds to shew that it is founded on certain pronouncements of the civil law, and proceeds accordingly to shew that a slave sold with a knowledge that he was a thief makes his master responsible to the purchaser for any theft he may commit.

M. Bugnet, the learned commentator, points out in the note quoted that it is impossible to render the drawer responsible for an act to which he is no party, and it would be impossible to particularise all the precautions that it would be necessary to take. The language used, "la faute du tireur," may be satisfied by a great many things which certainly the English law would not recognise as an answer, but which the language of Pothier would obviously include.

The careless keeping of a cheque-book, like the careless keeping of the seal in the *Bank of Ireland* v. *Trustees of Evans' Charities* (1), might well satisfy the words "faute du tireur," and I confess I should regard with great apprehension a decision that anything that a jury should regard as "faute du tireur" should render a forged instrument valid.

As M. Bugnet truly says, it is impossible to particularise all the things that might have to be considered—the sort of

(1) 5 H. L. C. 389.

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paper, the ink. There are well known precautions which, for greater security, some banks take to prevent the forgery of their notes. There is some colour which prevents, or at all events renders difficult, imitations by photography; and is it to be in each case a question for the jury whether this or that precaution was omitted in drawing a bill, or in accepting it when drawn?

It seems to me it would be a very serious proposition to lay down that such questions should be permitted to arise when dealing with such an instrument as a bill of exchange; and other questions would then arise, as, I think, was pointed out in the course of the argument—a minute examination of every bill tendered for acceptance, and a consideration of how far its form might give an opportunity to a forger to forge and escape detection.

My Lords, this very case has in almost precisely similar circumstances been already decided in the *Adelphi Bank* v. *Edwards* (1), and I regret very much that that case has not been reported. I entirely concur with what Lindley L.J. said in that case, that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of Bovill C.J., in a former case, *Société Générale* v. *Metropolitan Bank* (2), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.

It appears to me that even the modified rule laid down by Pothier, considering the principles on which that learned author himself relies for its acceptance, is not and never has been the law of England. I think this appeal ought to be dismissed with costs.

LORD WATSON. My Lords, the appellant, who is the onerous holder of a bill of exchange purporting to be for 3500*l.*, seeks in this suit to recover that sum from the respondent. [His Lordship stated the facts given above.]

(1) Not reported; the facts, the decision and the grounds thereof are stated in the judgment of Lord Watson, p. 540.

(2) 27 L. T. (N.S.) 849, 856.

The case was tried before Charles J., upon the facts already stated, with these further admissions made by the appellant: (1.) That the respondent was ignorant of bill transactions; (2.) that he knew nothing about the stamp laws; and (3.) that he had good reason to place implicit confidence in the honesty of Scott Sanders. With regard to the first and second of these admissions, I must observe that, in my opinion, ignorance of bill transactions or of the stamp laws will not, in a question with an onerous and bonâ fide holder, absolve persons who, notwithstanding their ignorance, choose to engage in such transactions from the fulfilment of any duty or obligation which the law imposes upon the parties to a bill of exchange. The reasonable belief of the respondent in the honesty of the person by whom the bill was drawn and presented to him for acceptance might, if he was under a legal duty to take precautions against its fraudulent alteration, be an element of importance in considering whether, as matter of fact, he acted negligently, as the appellant alleges.

The appellant did not maintain that the respondent either directly authorized, or meant to authorize, Scott Sanders to alter the amount of the bill. Nor did he maintain that the respondent had by his subsequent conduct homologated or adopted the alteration. He contended that the law merchant imposes upon every person who either draws or accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of its amount being fraudulently increased; that the respondent negligently failed to perform that duty, inasmuch as he accepted a bill written upon a stamp sufficient to cover the altered amount, and having spaces left blank in the writing which enabled the drawer to fill them up in such a manner as to effect and at the same time to conceal his fraud; and that, by reason of such negligence, the respondent is estopped from denying his liability for the full amount of 3500*l.* appearing on the face of the bill.

Charles J., who appears to have relied upon the authority of *Young* v. *Grote* (1), held in point of law that, if the acceptor of

(1) 4 Bing. 253.

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a bill of exchange "signs it negligently in such a shape as to render alteration a likely result, he is responsible on the altered instrument." Upon the facts of the case the learned judge came to the conclusion that the respondent had not been guilty of negligence; but in respect that the alteration of the bill was not apparent, he found that the appellant was entitled to the money which had been paid into court, and entered judgment for the respondent. His decision was affirmed, but not upon the same grounds, by a majority of the Court of Appeal. The Master of the Rolls and Rigby L.J. were of opinion that, although the rule contended for by the appellant might prevail as between a customer and his banker, it was not applicable according to English law as between the acceptor of a bill of exchange and subsequent holders. Their Lordships were further of opinion that the rule, assuming it to have previously existed, was abolished by s. 64 of the Bills of Exchange Act 1882. Lopes L.J. dissented, being of opinion that the principle of *Young* v. *Grote* (1) applied as between the acceptor and an indorsee acquiring right to the bill after his acceptance; and his Lordship also, differing from Charles J., held that the respondent had been negligent, and that the appellant ought, therefore, to have judgment for the full amount of the bill as fraudulently altered.

In these circumstances it becomes necessary to examine the authorities which were noticed by the learned judges or were cited in the able argument addressed to us on behalf of the appellant. Such of these authorities as really bear upon the doctrine propounded by the appellant are few in number. Of the rest, some have a very distant relation to it; whilst others are irrelevant.

The basis of the appellant's argument is to be found in *Young* v. *Grote*. (1) In that case the customer of a bank signed several blank cheques and gave them to his wife, to be filled up and negotiated by her as she required. In one of these the sum of 50*l*. was inserted, in her presence and at her request, by a clerk, to whom she then gave the cheque in order that he might get the money for her. In writing the

(1) 4 Bing. 253.

sum the clerk had left spaces with fraudulent intent, so as to enable him to increase the amount to 350*l.*, which was paid to him by the banker. Best C.J. and three other learned judges of the King's Bench held, in these circumstances, that the banker was entitled to take credit, in account with his customer, for the full amount which he had paid upon the cheque.

The doctrine laid down by Pothier (Traité du Contrat de change, Chap. IV., Art. III., s. 99) was referred to with approval by some of the learned judges. In that passage the author deals with the mutual rights and obligations arising out of the contract of mandate which subsists between a banker and the mandant whose cheques or orders he has undertaken to pay. He notices the rule of the Roman Law, which had been followed by Scacchia, to the effect that "mandator debet refundere mandatorio quicquid ei inculpabiliter abest ex causâ mandati." According to that rule, the customer would be liable for the amount of a fraudulently altered cheque in every case where the banker could not have detected the alteration by the exercise of reasonable care. Pothier qualifies the rule, and in so far favours the customer, by limiting his liability to those cases in which his own negligence in drawing the cheque has given the opportunity for its alteration.

The reported opinions of the learned judges leave it doubtful whether their decision in *Young* v. *Grote* (1) went upon the doctrine of Pothier, or upon the ground that the customer by signing a blank cheque had undertaken liability for any sum which might be filled in before it was presented for payment. I think the Lord Chancellor (Cranworth) must have had the first of these grounds in view when he said, in *Bank of Ireland* v. *Trustees of Evans' Charities* (2): "Now, the case of *Young* v. *Grote* (1) went upon that ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the cheque for 350*l.*; and if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that as

(1) 4 Bing. 253. (2) 5 H. L. C. at p. 413.

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between them is just the same as if he had signed it." On the other hand, Lord Wensleydale (then Parke B.), when delivering the opinion of seven judges of the Exchequer Chamber in *Robarts* v. *Tucker* (1), indicates that *Young* v. *Grote* (2) was decided upon the second ground. After referring to the facts of the case, he observed: "This was in truth considering that that customer had, by signing a blank cheque, given authority to the person in whose hands it was to fill up the cheque in whatever way the blank permitted."

Guardians of Halifax Union v. *Wheelwright* (3) appears to me to be a decision in entire conformity with the doctrine of Pothier. The guardians were in the habit of passing orders upon their treasurer, who was local agent of the bank in which their money was deposited. Some of these orders written by their clerk, and thereafter signed by the guardians, were drawn by the clerk in such a way that he was enabled to increase their amounts before he presented them for payment. The Court held that the treasurer was in the same position as if he had been their banker; and that the guardians were estopped, by their negligent drawing of the orders, from maintaining that he had not their authority to pay the full amount of these orders, as fraudulently increased.

In my opinion, *Young* v. *Grote* (2) can have no bearing upon the present case, if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in *Young* v. *Grote* (2) was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for

(1) 16 Q. B. 560. (2) 4 Bing. 253.
(3) L. R. 10 Ex. 183.

its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange.

The duty which the appellant's argument assigns to an acceptor is towards the public, or what is much the same thing, towards those members of the public who may happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on any sound legal principle. In many if not most cases which occur in the course of business, the bill is written out by the drawer, and sent by him to the acceptor, who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned, if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very serious complications in commercial transactions. Besides, it is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate: although there may be an exception in the case where one of the parties to the instrument has, either by express agreement or by implication established in the law, become bound to use such precautions. I am therefore unwilling in the case of an acceptor to affirm the doctrine upon which the appellant relies, unless it can be shewn to be established by authority as part of the English law merchant.

I shall briefly refer to four decisions, because they were either cited in argument, or have been discussed, in this or similar cases by the Courts below. All of these cases related to bills of exchange; but in none of them had there been any alteration of the amount for which the acceptor signed.

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In *Ingram* v. *Primrose* (1) the facts were, that an acceptance was returned to the acceptor in the same condition in which it had been issued by him. He tore the bill in two, and threw away both parts in the street, where they were picked up by a passer-by, who pasted them together and negociated the restored bill. The acceptor was found liable to an onerous holder, not because he had signed a bill which facilitated fraud, but upon the obvious consideration that he had negligently put into circulation a negotiable document which had not been properly cancelled.

Arnold v. *Cheque Bank* (2) had its origin in these circumstances. A firm in New York purchased there a genuine bill on London, which they indorsed to an English creditor, and inclosed in a letter addressed to him. The letter inclosing the bill was stolen from their letter-box by one of their clerks; and the stolen bill was paid by a bank in London upon a forged indorsation. It was held that such payment did not afford a good defence to the bank against a claim by the genuine indorsee and true owner of the bill. No question arose as to any duty owing by the acceptor of the bill.

In *Baxendale* v. *Bennett* (3) it was decided that an acceptor was not liable to the holder upon a bill accepted by him in blank, which had been stolen from his drawer and filled up and circulated by the thief. A different decision was given in *London and South Western Bank* v. *Wentworth* (4), where a bill was intrusted by the acceptor, for the purpose of its being negotiated, to a person who fraudulently disposed of the bill, and appropriated its proceeds. The difference of result in these two cases was plainly due to the fact that in the one the acceptor had not, and in the other he had, issued the bill as a negotiable document. But in neither case did the decision of the Court turn upon the supposed duty of the acceptor to guard against fraudulent alterations of the bill.

I shall now proceed to consider the remaining and only English authorities which appear to me to be in point. Before doing so, I think it is not immaterial to observe that Pothier,

(1) 7 C. B. (N.S.) 82.
(2) 1 C. P. D. 579.
(3) 3 Q. B. D. 525.
(4) 5 Ex. D. 96.

who is the real author of the doctrine relied on by the appellant, in the passage cited by the learned judges who decided *Young* v. *Grote* (1), only applies it to the case of a banker and his customer. But in Art. III. of the same chapter of his treatise the learned author discusses the nature of the contract which is constituted between the drawer and the acceptor of a bill which he asserts to be "un vrai contrat de mandat, mandatum solvendæ pecuniæ." I think it is apparent from the context of Art. III. that the rule laid down by Pothier in s. 99 was meant by him to apply, not only as between banker and customer, but as between a drawer and an acceptor who pays in compliance with his drawer's mandate. But the rule has no application to parties between whom there is no subsisting contract of mandate. According to its terms, an acceptor, who paid the full sum appearing upon the face of a bill which he knew or had reason to believe had been fraudulently increased after his acceptance, would have no right to recover the increased amount from his drawer.

It was argued that certain expressions used by Lord Blackburn (at that time Blackburn J.) in *Swan* v. *North British Australasian Co.* (2) tend to shew that the rule which Pothier applies to a customer who draws a cheque upon his banker has application also as between the acceptor of a bill and possible future holders. His Lordship there said, with reference to *Young* v. *Grote* (1): "It may be that the case is to be supported upon some of the grounds there stated, or upon the broader ground apparently supported by the authority of Pothier in the passage cited in *Young* v. *Grote* (1), that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary to inquire how that may be." Lopes L.J. infers from these words that "it is impossible not to see that in the case of negotiable instruments Blackburn J. thought the duty did exist." I am unable to assent to that inference. The words convey anything but a hearty approval of the decision in *Young* v. *Grote* (1), and at the most they

(1) 4 Bing. 253. (2) 2 H. & C. 175, 182.

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do not even amount to obiter dicta. They contain no expression of judicial opinion, and do nothing more than state the tenor of an argument which the noble and learned Lord had not found it necessary to consider. One thing seems certain, namely, that his Lordship had not examined the text of Pothier, which contains no such doctrine as his words impute.

Several points were raised for the decision of the Court of Common Pleas in *Société Générale* v. *Metropolitan Bank, Limited* (1), and one of these came very near to the question which your Lordships have to consider in this case. The time of payment of a bill of exchange had, after issue, been fraudulently altered from eight to eighty days after date. The alteration being material, it was sought to make the indorser liable, upon the ground that he had negligently left a vacant space in the bill, between the words "eight" and "days," which enabled a fraudulent holder to add the letter "y" without risk of the fraud being detected upon inspection of the document. The Court, consisting of Bovill C.J., with Keating and Brett JJ., came to the conclusion that the indorser was not liable. None of the learned judges affirmed that there was any duty incumbent upon the indorser to take precautions against forgery; but, on that assumption, they all held that there had been no negligence. Two of them used language which does not appear to me to be consistent with the existence of such a duty. The Chief Justice observed: "Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, not the vigilance of parties in excluding all possibility of committing it." The present Master of the Rolls said: "I not only protest that there was no negligence, but say that no judge ought to leave to a jury the fact as evidence of negligence. But there is no duty on any one to suppose that those against whose character there is no imputation will commit forgery whenever the opportunity occurs."

The next and the last of the English authorities which raised the same questions of law and fact which occur in this appeal is *Adelphi Bank* v. *Edwards* (2), decided in the year 1882. The case has not been reported; but in the course of the argument

(1) 27 L. T. 849. (2) Not reported.

your Lordships had the advantage of considering the shorthand writer's notes of the opinions delivered by the learned judges, both in the Court of first instance and in the Court of Appeal. From these it appears that the defendant Edwards had accepted a bill for 22*l.* 10*s.*, which was written on a stamp sufficient to cover 300*l.* Spaces were left in the writing, which enabled a fraudulent holder to increase the amount of the bill to 222*l.* 10*s.* by inserting the figure "2" between the letter "£" and the figures "22" in the corner of the bill, and by adding the words "two hundred" at the end of one line, and the word "and" at the beginning of the next. The plaintiff bank, having paid the increased amount, sued the acceptor, upon the same arguments which have been submitted to your Lordships on behalf of the appellant.

Chitty J., before whom the case was tried, was of opinion that, upon the law contended for by the plaintiff, the defendant had not been guilty of negligence. At the same time, the learned judge did not accept that law. He said: "The defendant, in my opinion, as a prudent man of business, was not bound to contemplate that the bill was coming into fraudulent hands, nor that by the perpetration of a crime it would be altered in the manner in which it has been altered."

In the Appeal Court, the learned judges took the same view of the facts as Chitty J., but they also negatived the existence of any rule or principle requiring the acceptor of a bill to exclude facilities for its alteration. Baggallay L.J. said: "It seems to me impossible to say that there was any duty on the part of the acceptor of this bill towards the party who might subsequently become the holder of the bill, so to criticise, and so to examine the bill before he signed, as to put it out of the possibility of any additional words being afterwards inserted in it." The present Master of the Rolls (then Brett L.J.) stated forcibly the same opinions, which he has expressed in stronger language and at greater length in this case. Lindley L.J., after referring to *Young* v. *Grote* (1) and "that class of cases," proceeded thus: "We cannot say there was negligence here, unless we go the whole length of saying that it is negligence to sign a negotiable

(1) 4 Bing. 253.

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instrument so that somebody else can tamper with it. I cannot go that length. I think it would be wrong. There is no authority which compels us to do anything of the sort."

Two decisions of the Court of Session belonging to a period when the commercial law of Scotland was yet in its infancy, *Graham* v. *Gillespie* (1) and *Pagan & Hunter* v. *Wylie* (2), were founded on by the appellant. Both cases were decided upon what I consider a false analogy, namely, that the acceptor of a bill for a definite amount, which is capable of being fraudulently increased by the insertion of additional words and figures, stands in exactly the same position as the acceptor of a blank bill. The American case of *Garrard* v. *Haddan* (3), which was also cited for the appellant, is open to the same criticism.

The result of the English authorities is, in my opinion, decidedly adverse to the appellant. Before the present action was brought, the rule for which he contends had, so far as I have been able to find, never been enforced in an English Court or affirmed by an English judge. On the contrary, it had been disapproved by Bovill C.J. and the present Master of the Rolls in *Société Générale* v. *Metropolitan Bank* (4); and the case of *Adelphi Bank* v. *Edwards* (5), in which four judges were unanimous, is a direct precedent against it. It is, no doubt, within the competency of this House to overrule the decision in *Adelphi Bank* v. *Edwards* (5); but I see no reason why your Lordships should do so. The doctrine of Pothier, out of which the contention of the bill-holder in this and previous litigations has grown, is founded upon reasons which have no application to any question between a drawer or acceptor and a holder acquiring right to the bill after acceptance; and I know of no principle of law which would warrant its extension to that case.

I desire to add that, had your Lordships thought fit to accept the legal argument of the appellant, I should not have been of opinion that the claim which he makes in this action was excluded by s. 64 of the Bills of Exchange Act. That clause

(1) Morr. Dict. 1453.
(2) Morr. Dict. 1660.
(3) Pennsylv. 17 Smith, 82.
(4) 27 L. T. 849.
(5) Not reported.

admits an action for the altered amount of the bill, when the acceptor has authorized the alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorize the fraud committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had "authorized" the fraudulent alteration within the meaning of s. 64.

For these reasons, I also am of opinion that the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN. My Lords, Charles J. and Lopes L.J. are both of opinion that a person who accepts a bill of exchange intending that it should be put into circulation owes to every one who may become the holder a duty which they define or describe as the duty "not to be negligent with regard to the form of the instrument."

Agreeing so far, the opinions of the learned judges diverge at this point.

It is part of the history of the case that the bill presented to Lord Londesborough for his acceptance was designed to facilitate a premeditated forgery. But Charles J. finds that under the circumstances the instrument as presented would not have aroused suspicion in the mind of a reasonably prudent person; and therefore he comes to the conclusion that Lord Londesborough was not guilty of that sort of negligence which would make him liable for the consequences of the crime afterwards consummated. Lopes L.J., on the other hand, thinks that the bill before acceptance presented such obvious opportunities for alteration, and such a combination of suspicious circumstances, as ought to have attracted the attention of any man of ordinary prudence. He considers that Lord Londesborough by his want of care and caution "enabled" the drawer to commit the forgery. Thinking that forgery was the result "to be anticipated," he holds that Lord Londesborough must suffer for his neglect.

Assuming the existence of the duty which both these learned

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judges would cast upon the acceptor of a bill of exchange, I should be disposed to agree with Charles J. rather than with the Lord Justice. To me it seems extravagant to suggest that the acceptor of a bill is bound to be familiar with the different steps in the scale of stamp duties, and to recognise a stamp of a higher grade than is required for the purpose in hand as an indication of fraud. With regard to the gaps or vacant spaces in the bill as presented to Lord Londesborough, I think a person of ordinary prudence who had confidence in the man with whom he was dealing, and who never had had his attention called to this species of fraud, might well have passed them by unnoticed, or if he had happened to notice them might have thought them of no moment. I cannot think that there is any rule which forbids you to give a person with whom you are acquainted, and whom you believe to be honest, some little credit for honesty even when he comes for your promised acceptance to a bill of exchange. I cannot think that even on such an occasion you are bound to scan his handiwork with the eye of a detective, as the production of a would-be forger. The prevention of crime is perhaps better left to the operation of the criminal law.

However that may be, I agree with your Lordships in thinking that the supposed duty does not, in fact, exist.

Both the learned judges who are in favour of the doctrine refer it to "the principle of *Young* v. *Grote*." (1) *Young* v. *Grote* (1) is a case which has excited as much diversity of opinion as any case in the books. It has given rise to various explanations not altogether uniform or consistent. That circumstance of itself is regarded by some judges as a badge of merit and a passport to the confidence of the profession. But when you are in search of a principle, the effect is rather embarrassing. And therefore, it is with some diffidence that I venture to inquire, What, after all, is the true principle of *Young* v. *Grote* ? (1)

In *Orr* v. *Union Bank of Scotland* (2), in 1854, and again in *Bank of Ireland* v. *Trustees of Evans' Charities* (3), in 1855.

(1) 4 Bing. 253. (2) 1 Macq. 513.
(3) 5 H. L. C. 389.

Cranworth L.C. had occasion to comment on *Young* v. *Grote*. (1) In the former case, referring to *Young* v. *Grote* (1), "The principle," he observes, "is a sound one, that when the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine."

If that be the principle of *Young* v. *Grote* (1), I do not think it helps the appellant much. Lord Cranworth treats the relation of banker and customer as the governing feature in the case. That relation is, I think, a long way off from the connection between the acceptor of a bill and a subsequent holder.

The observations of Parke B. on *Young* v. *Grote* (1), in delivering the opinions of the judges in *Bank of Ireland* v. *Trustees of Evans' Charities* (2), are much to the same effect. Nor do I think that there is any difference in substance between the views expressed by Lord Cranworth himself in the two cases. In the later case he seems to treat the decision in *Young* v. *Grote* (1) as founded on estoppel, though, as Cockburn C.J. points out, *Young* v. *Grote* (1) was "decided without reference to estoppel at all." (3)

Other judges, including Parke B. himself, in the earlier case of *Robarts* v. *Tucker* (1851) (4), have held that *Young* v. *Grote* (1) is to be supported on the ground that the customer had by signing a blank cheque given authority to any one in whose hand it was to fill it up in any way the blank permitted. If that is the real ground of the decision, it has still less bearing on the present case, where nothing further was required to be added after Lord Londesborough's acceptance to give effect or negotiability to the instrument.

Whatever may be the better ground for supporting the decision in *Young* v. *Grote* (1), it is obvious, on referring to the report in Bingham, that the Court went very much on the authority of the doctrine laid down by Pothier, that in cases of mandate generally, and particularly in the case of banker and

(1) 4 Bing. 253.
(2) 5 H. L. C. 389.
(3) 2 H. & C. 189.
(4) 16 Q. B. 560.

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customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder.

The only other case on which much reliance was placed on the part of the appellant was the case of *Swan* v. *North British Australasian Co.* (1), which was cited for the observations of Blackburn J. (2) With the comments which have been made on those observations by my noble and learned friend, Lord Watson, I quite agree. If the report is correct, the reference to Pothier is certainly inaccurate.

Passing from authority, I must say that I am not at all persuaded that the contention on the part of the appellant can be supported on principle or on grounds of convenience. It was said that the negotiability of bills of exchange would be seriously impaired if persons who act as Lord Londesborough acted are not to be held liable for all the consequences of their want of caution. But I must say I was very much struck with some observations which fell from one of your Lordships during the argument, to the effect that the consequences to the transaction and dispatch of mercantile business would be serious indeed if it were laid down that a person under obligation to accept a bill was at liberty to refuse or delay acceptance, on the ground that there was something in the form of the instrument of which a skilful forger might perhaps take advantage. After all, it is the drawer of a bill of exchange who has control over its form: the obligation of the acceptor is to pay the bill at maturity. Censorship over the form of the instrument is, I think, no part of his duty.

I am of opinion that the appeal must be dismissed.

LORD MORRIS. My Lords, I am of the same opinion. The liability of the defendant must arise either from, first, his complicity in the fraud; or, secondly, from some contractual relation, express or implied, between him and the holder of the bill of

(1) 2 H. & C. 175. (2) 2 H. & C. 182.

exchange; or, thirdly, from some duty he owed to the holder. There is no pretence of any complicity by the defendant; there is no privity between the plaintiff and the defendant from which any contract can be spelled out. Well, is there any duty on the acceptance of a bill to a subsequent holder that the acceptor should scrutinize the bill presented to him for acceptance? In my opinion, none beyond this—that he should see that he accepts a bill filled up, because if he accepts a bill in blank that implies an authority to the person getting the acceptance to fill up the amount.

In *Young* v. *Grote* (1) the acceptance was in blank. Even if well decided on its particular facts, and a case between banker and customer, I fail to see how it governs this case, where the defendant accepted a regularly filled up bill. If the defendant could be held liable, it appears to me an indorser would also be bound to enter on a scrutiny of the bill in order to protect himself from a subsequent holder. This case is an attempt to impose a new duty on an acceptor of a bill of exchange. The doctrine of estoppel binds an acceptor who accepts a blank bill, because by doing so he is precluded from setting up as a defence that he did not authorize the filling up: that doctrine has no application to the present case.

LORD SHAND. My Lords, I concur in thinking the appeal ought to be disallowed.

The weight of judicial opinion and authority is clearly against the contention of the appellant, unless indeed it could be shewn that the case of *Young* v. *Grote* (1) had a direct application, and that the grounds of that decision were applicable to the facts which have been here proved.

The question here raised was expressly decided in 1882 against the view contended for by the appellant, in the case of the *Adelphi Bank* v. *Edwards* (2), in which the judgment of Chitty J. was unanimously affirmed by the Court of Appeal; and, besides the opinions of Bovill C.J. and the present Master of the Rolls in the case of the *Société Générale* v. *Metropolitan*

(1) 4 Bing. 253.

(2) Not reported. The facts, the decision, and the grounds thereof, are stated in Lord Watson's judgment, p. 541 above.

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Lord Shand.

Bank (1), the same judgment has now been repeated by a majority of the Court of Appeal.

As to the case of *Young* v. *Grote* (2), I find nothing in the grounds of the judgment which supports the proposition that an indorsee of a bill of exchange for value has a legal claim against the acceptor, against whom no want of bona fides can be alleged, for a sum beyond the amount for which the acceptance was given, on the ground of negligence in his having given his acceptance to a bill in such a form and impressed with such a stamp as enabled the drawer to commit a forgery by enlarging the amount for which the acceptance was granted in such a way as to escape detection by the indorsee. The case of *Young* v. *Grote* (2), between a banker and his customer, was one in which there was the relation of parties contracting with each other. It appears to me that the ground of decision, as reported, was in conformity with the limited doctrine of Pothier, that this relation inferred, if not expressly, at least by implication, the duty and obligation on the customer's part, in issuing cheques on his banker to third parties, to take care that these were not in such a form as to give the means of enlarging their amount without this being readily detected. In that view of the case the decision does not apply here, where the acceptor and the indorsee of the bill were strangers to each other, having no relation as contracting parties, which could imply the duty and obligation of the banker's customer to the banker. If, as has been suggested, the decision in *Young* v. *Grote* (2) turned on the fact that the customer had signed cheques wholly blank in amount, by which the person acquiring possession might be held to have a mandate to fill in any sum he chose, the case has no application to the present. The acceptor here signed no bill blank in the sum, for there was expressed in writing in the body of the bill the amount for which he agreed to undertake liability.

I agree with your Lordships in holding that there is no sound reason or legal principle to support the view that, on the ground of negligence, an acceptor of a bill becomes liable to a subsequent holder for a sum beyond the amount of his acceptance because

(1) 27 L. T. 849. (2) 4 Bing. 253.

the form of the document and the stamp used admit of a forgery in the hands of a dishonest person, such as occurred in this case. As to the stamp, I do not believe that in the course of ordinary business persons accepting bills scrutinize the paper on which a bill is written to see the amount it will carry; and I am certainly not prepared to say they are in any way required, as a matter of duty or obligation, to do so. Stamps of higher value than necessary must be often used when it is difficult or inconvenient to get a stamp of the precise value wanted. As to the form of the document, I think an acceptor, while himself acting in bonâ fide, who has the sum for which he has agreed to grant his acceptance expressed in the body of the bill, is not called upon to anticipate and provide against forgery. To hold the contrary would lead to great inconvenience in business. An acceptor scrutinizing a bill might think it left room for a fraudulent addition, and might refuse acceptance to the serious injury of the drawer residing at a distance, or abroad, or of a drawer who might have indorsed the bill for value given before acceptance, and he might be involved in litigation and found to have been unduly apprehensive and in the wrong; while after acceptance numerous and difficult questions might frequently arise as to what constituted negligence in particular cases like the present, in which two learned judges have differed on the point.

I think the appellant has failed to shew that his contention is founded on sound legal principles; and though cases of successful fraud and forgery will, no doubt, occur from time to time, notwithstanding the risk of penal consequences incurred by the forger, yet a decision giving effect to the appellant's argument would, I think, lead to so great inconvenience in business and so much litigation as to create a greater evil than can arise under the existing law as now settled by your Lordships' judgment.

LORD DAVEY. My Lords, I have had an opportunity of reading and considering the judgment which has been delivered by my noble and learned friend opposite (Lord Watson), and I so entirely agree in the conclusion at which he has arrived and the reasons which the noble and learned Lord has expressed in

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support of his view, that I have not felt it necessary to write a judgment of my own. I only desire to say that in my opinion our judgment in this case is outside the case of *Young* v. *Grote*. (1) The doctrine of that case was one arising out of the relation of mandant and mandatory, which does not exist in the case of the acceptor and holder of a bill of exchange.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 31, 1896.

Solicitors for appellant: *Smith, Fawdon & Low.*
Solicitors for respondent: *Saltwell, Tryon & Saltwell.*

(1) 4 Bing. 253.

[PRIVY COUNCIL.]

TORONTO RAILWAY COMPANY . . . PLAINTIFFS; J. C.*

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AND

THE QUEEN . . . . . DEFENDANT. *July* 16, 31.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Construction—Dominion Act (50 & 51 *Vict. c.* 39), *s.* 1, *item* 88; *s.* 2, *item* 173—*Imported Steel Rails—Railways—Street Railways —Tramways.*

Although there may be in various Canadian Acts and for other purposes substantial distinctions between railways or railway tracks and street railways and tramways, yet, for the purpose of separating free and dutiable articles, such distinction is not maintained in Canadian Act 50 & 51 Vict. c. 39, and its three predecessors.

According to the true construction of that Act (see s. 1, item 88, and s. 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended.

APPEAL from a decree of the Supreme Court (June 26, 1895) affirming a decree of the Exchequer Court of Canada (Oct. 29, 1894), and dismissing the appellants' action with costs, which was brought to recover $56,044 : 17, paid by them under protest in respect of duties upon certain steel rails imported by them for use in their railway tracks.

The question was whether the steel rails in question were dutiable articles under s. 1, item 88, of the Dominion Customs Act (50 & 51 Vict. c. 39), or whether they were relieved of the duties imposed by the Act by s. 2, item 173, as being above a certain weight.

The facts are stated in the judgment of their Lordships.

Burbidge J. was of opinion that the terms "railway" and "railways," commonly used, without any qualifying words or circumstances, would be taken to mean one of the ordinary railways of the country which transport passengers and freight,

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

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and upon which, in general, locomotive engines have hitherto been in use. He referred to the fact that in the Act of 1885 (48 & 49 Vict. c. 59), in the item under which "steel railway rails" were made free of duty, it was declared in terms that the expression should not include "tram or street rails," using both words, the second of which he stated would be clearly superfluous if the term "tram rails" included street rails; and he stated that but for that circumstance he would have thought that the word "tramway" in the 88th item of the Act of 1887 included, and that the word "railway" in the 173rd item did not include, a street railway. In view of that circumstance, however, he considered that if there were no legitimate aids to assist in discovering the intention of the Legislature other than the language used in the Acts of 1885 and 1887, the question would be so involved in doubt that the plaintiff should succeed. He then considered the fiscal policy and the national policy of the country, and came to the conclusion that the exemption of steel rails from taxation was for the encouragement of the construction and extension of railways in the proper sense, namely, of railways of the same class as those which had been the objects of the care and bounty of Parliament, and had no application to the case of street railways. For these reasons he gave judgment for the respondent.

In appeal, Strong C.J. and King J. were of opinion that the appellants' street railway was a railway and not a tramway within item 88, and that even if it were a tramway within item 88 the rails in question were exempted from duty by the provisions of item 173.

Taschereau, Gwynne, and Fournier JJ. were of opinion that by the course of the legislation of the Dominion the difference between railways and tramways was well recognised, that within the purview of such legislation the appellants' street railway was a tramway, and that item 173 had no application to the rails in question, but applied only, in the words of Gwynne J., to "steel rails for use in the tracks in those great arterial commercial undertakings for the transport by interconnection with each other throughout the continent not only of

passengers, but of goods, wares, merchandise, chattels, and cattle of every description, which are denominated 'railways' without any qualifying prefix."

Robinson, *Q.C.*, and *Osler*, *Q.C.* (both of the Colonial Bar), contended, for the appellants, that the rails in question were exempt from duty under item 173 of s. 2. They exceeded in weight 25 lbs. to the lineal yard. Consequently they came within the exact words of item 173, and were duty free. The only way in which they could be deprived of the benefit of the exemption was by cutting down the meaning of the words "for use in railway tracks," so as to exclude the particular railway tracks of the appellants. The governing principle in the construction of statutes imposing duties or taxes is that the intention of the Legislature to impose the duty must be clear and unequivocal. Otherwise the subject is not liable. Here they fall within the express terms of an exemption; but it is contended that the rails were used for a tramway, and not a railway, because the appellants' railway runs through a street. It was contended that no such distinction could be drawn against a subject claiming the benefit of the exemption in item 173. The weight of the rails constituted the title to exemption; whether the rail tracks ran through a street or were entitled to be called tramway tracks was not a circumstance within the contemplation of the Legislature in enacting the item. Reference was made to *Homer* v. *The Collector* (1); *Doughty* v. *Firbank* (2); *Johnson* v. *Louisville Ry. Co.* (3); *Great Northern Ry. Co.* v. *Tahourdin* (4); *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority*. (5)

Newcombe, *Q.C.* (of the Colonial Bar), *Loehnis*, and *Hodgins* (of the Colonial Bar), for the respondent, contended that the rails in question were clearly liable to duty on item 88 of s. 1, and were not exempted by the doubtful exemption contained in item 173. The evidence shewed that according to common

(1) 1 Wallace, 486.
(2) 10 Q. B. D. 358.
(3) 2 Duvall, Kentucky Reports, 175.
(4) 13 Q. B. D. 320.
(5) [1892] 1 Q. B. 357.

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acceptation the word "tramway" included, and that the word "railway" did not include, a street railway. The appellants admittedly carried on a purely street railway business. Such a railway is not a railway within item 173, but is a tramway within item 88. The distinction between railways and tramways runs through both Dominion and provincial legislation, and street railways are affected by the tramway and not by the railway legislation. These rails are not like rails used for railway tracks, and cannot be used by railways. They were not within the intention of the Legislature, whose fiscal and national policy was to exempt by item 173 from duty rails for use in great commercial undertakings properly called "railways," and not rails for use in local streets. Reference was made to *Attorney-General* v. *Lamplough* (1); *Attorney-General* v. *Niagara Falls and Clifton Tramway Co.* (2); *In re Brentford and Isleworth Tramways Co.* (3)

The appellants' counsel were not heard in reply.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. The question in this appeal is whether the appellants are bound to pay duty on steel rails imported by them for the purposes of their business. They have paid under protest the sum demanded by the Crown, and they seek to recover it in the present action, which was brought in the Exchequer Court of Canada. The Act governing the case is that of 1887 (50 & 51 Vict. c. 39). The Crown contends that duty is payable under item 88 of s. 1, which affects "iron or steel railway bars and rails for railways and tramways." The appellants contend that their rails are exempted by item 173 of s. 2, which applies to "steel rails for use in railway tracks."

Burbidge J., who tried the case in the Exchequer Court, decided in favour of the Crown. After subjecting the words to criticism, he concludes that if there were no legitimate aids to discovering the intention of the Legislature other than the language used in the Act of 1887 and previous Acts on the

(1) 3 Ex. D. 214. (2) 19 Ont. 624; S.C. 18 A. R. 453.
(3) 26 Ch. D. 527.

same subject, the question would be, to say the least, so involved in doubt that the appellants ought to succeed. But then he inquires into the policy of the Legislature; and, finding that its policy was to protect Canadian manufactures, he decides that the doubtful words must be construed in accordance with that intention, and that duty must be paid.

On appeal to the Supreme Court the decision of the Exchequer Court was upheld; but there were differences among the learned judges both in their conclusions and in the reasoning on which identical conclusions were based. The Chief Justice, with whom King J. concurred, examined the expressions "railway," "street railway," and "tramway," and he was of opinion that the appellants' road falls under the head of "railway," and not of "tramway" in item 88, and is a "railway track" within item 173. Gwynne J. thought that item 173 is not to be construed as exempting from duty some part of the particular things which by item 88 had been subjected to duty, but as providing for a different article altogether, namely, steel rails for use in great arterial commercial lines. He also thought that the word "railways" in item 88 meant railways ejusdem generis with tramways, and not the "railway tracks" mentioned in item 173. Taschereau J., with whom Fournier J. concurred, referred to various instances of expressions both in common parlance and in enactments to shew that "railways" on the one hand had been distinguished from "tramways" and "street railways" on the other; and, holding that the appellants' road is a "street railway" or "tramway," he decided that it falls within item 88 and not within 173. In that conflict of judicial opinion the case comes before their Lordships.

On two points they expressed themselves as clear during the argument. First, they cannot concur in the view that the policy of the Canadian Parliament leads to the construction contended for by the Crown. Supposing it to be made out by legitimate evidence that protection for Canadian manufactures was intended in 1887, protection is given however the Act be construed, and the only question is, how much? Secondly, they cannot see any reason for holding that the railways spoken of in item 88 are only those which are ejusdem generis with

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tramways, or that item 173 refers only to rails for great arterial lines.

The question is what is meant by the "railway tracks" for which rails are to be admitted free. The appellants were incorporated by an Ontario statute passed in the year 1892 (55 Vict. c. 99). They received authority to construct and work a double or single track street railway in Toronto. By the Ontario Street Railway Act (Ontario Revised Statutes, 1887, c. 171), companies chartered for that purpose may construct and work a double or single iron railway with necessary side tracks (s. 4). Sect. 5 provides that the railway track shall conform to the grades of the streets; and s. 6 that all other vehicles may use and travel on the said tracks, but giving place to the company's cars by leaving the tracks. It was stated at the Bar that the same expressions are found in an Ontario statute on the same subject passed in the year 1883.

The appellants, then, are the owners of what the legislature of their own province calls a single or double track street railway, and the line which they work is called a railway track. These expressions are not conclusive as to the meaning of the term as used by the Dominion Legislature in the Act under discussion. But they shew that the term is known to draftsmen of statutes in Canada, and is there applied to such a line as that of the appellants. It seems to their Lordships to be good evidence as to the meaning of the term in the mouth of a Canadian Legislature, and to afford primâ facie ground for holding that "railway track" includes a line of street railway.

Then, does the Act of 1887 contain any intrinsic evidence that the expression has some other meaning? Their Lordships look at the course of legislation on this subject. The first Act which imposed a duty on rails was passed in the year 1879, when one rate of duty was placed on "iron rails or railway bars for railways or tramways," and another rate on "steel railway bars or rails." According to the grammatical construction of the first of these sentences, iron railway bars are applicable both to railways and to tramways; and steel railway bars or rails appear to have the same application. There is no distinction taken between railways and tramways for this purpose.

In the year 1883 "steel railway bars or rails" were exempted from duty, and they remained free till 1885, when a new Act (48 & 49 Vict. c. 59) was passed which exempted "steel railway bars or rails, not including tram or street rails." This is the first mention of street rails, and it seems that the expression "railway bars or rails" was calculated to include tram rails and street rails (if indeed there is any difference between them), and that express words were thought necessary to exclude the latter from the exemption accorded generally to "steel railway bars or rails."

This, then, was the state of the enactments in 1887. Steel railway bars or rails were exempt from duty provided they were not tram or street rails. Then the Legislature appears to have taken a wholly new dividing line between free and dutiable articles. For the first time the distinction of weight was introduced. Item 88, which imposes duty on "iron or steel railway bars or rails for railways or tramways," follows the language of 1879 in treating railway bars and rails as applicable to both railways and tramways. Item 173 exempts "steel rails weighing not less than twenty-five pounds per lineal yard for use in railway tracks."

It is true that the expression of "street rails," which were disallowed the benefit of exemption in 1885, has now disappeared, and an elaborate argument, with much evidence directed to it, is submitted for the purpose of shewing on behalf of the Crown that the appellants' line is nothing but a tramway, taxed under item 88, and not exempted by 173. Their Lordships do not enter into this verbal discussion. It may be that in other Acts and for other purposes there are substantial distinctions between railways or railway tracks, and street railways and tramways. But for this purpose and in this Act and in its three predecessors there is not traceable any idea of making such a distinction, but rather the idea of putting all kinds of railways on the same footing, except in the one passage in the Act of 1885, in which the generality of the words "railway bars or rails" is limited by express words excluding "tram or street rails." They hold that the only distinction in the Act between taxed and free steel rails for railways is that of weight; and that as

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the rails of the appellants are above the specified weight and are for use on their railway track, they are exempted from duty. Their Lordships will humbly advise Her Majesty to discharge both the orders below, and to enter judgment for the appellants with costs in both Courts. The respondent must also pay the costs of this appeal.

Solicitors for appellants: *Freshfields & Williams.*

Solicitors for respondent: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[PRIVY COUNCIL.]

J. C.* 1896 *June* 16.

REMFRY . . . . . PLAINTIFF;

AND

SURVEYOR-GENERAL OF NATAL . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Construction—Grant of Land—Right to construct Watercourse—Right to divert Streams.

Where in a grant of land a right is reserved to make watercourses over it for the public use and benefit by order of Government:—

Held, that such reservation may include, and in the circumstances of this case did include, a right to divert water from streams in the land and to use the water so diverted.

APPEAL from a decree of the Supreme Court (March 29, 1894).

The question was whether the respondent was entitled on the true construction of a Government grant of land to the appellant to take water from a natural stream flowing through the appellant's land and having both its banks thereon, and to conduct the water so taken to a neighbouring town by means of an artificial watercourse. The appellant, having cut off the water flowing from the natural stream into the watercourse, was interdicted by order of the Supreme Court from obstructing the flow of water in the watercourse. The suit was brought to dissolve the interdict.

* *Present:* LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

Israel Davis and *Douglas*, for the appellant, referred to *Taylor* v. *Corporation of St. Helens* (1); *Sampson* v. *Hoddinott* (2); *Miner* v. *Gilmour*. (3)

Vernon Smith, *Q.C.*, and *Danckwerts*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD DAVEY. In this case the respondent, the Surveyor-General of Natal, on behalf of the Government, sued for and obtained an inderdict to prevent the appellant from cutting off the water flowing in a certain artificial watercourse on the appellant's land. The appellant thereupon moved to dissolve the interdict. The real question was whether the watercourse in question was rightfully made and maintained in the appellant's land, and this depends on the true construction of the grant under which the appellant holds. That grant contains the following reservations: first, that "all authorized roads, watercourses, and thoroughfares, now made, or running over, or through the said land, shall remain free and uninterrupted, as in their present or past use"; and, secondly, that "the said land shall be liable without compensation to any proprietor, or to any sub-grantee or lessee thereof, to have any road or roads and watercourses made over any part of it, for the public use and benefit, by order of the Colonial Government; except those parts on which any building may actually be erected at the time when any such road or watercourse is required to be made, and in respect of which building, if required to be removed for any such purpose, reasonable compensation shall be made by the said Government."

It was apparently at first believed by the Government officials that the watercourse in question, which is described as No. 3, was in existence at the time of the grant. From the evidence given in this case that appears to be a mistake. It was, in fact, made in or about the year 1881; and according to the view of the evidence taken by the Court below, it was laid out and constructed, and has been maintained at the expense of

(1) 6 Ch. D. 264. (2) 26 L. J. (C.P.) 148.
(3) 12 Moo. P. C. 131.

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the Government, for the purpose of supplying the township, or projected township of Stuartstown, including the Government buildings therein, with water. Their Lordships see no reason to dissent from this statement of the facts of the case.

It has been argued that an authority to make a watercourse does not authorize the abstraction of water from the natural stream flowing in the appellant's land; and also that it is not proved that the watercourse No. 3 was made by order of the Colonial Government. It is to be observed that the first point is not referred to in the judgment delivered by the Chief Justice, and apparently was not taken in the Court below. Their Lordships are of opinion that it cannot be maintained. It cannot be denied that a "watercourse" may mean, and, perhaps, the more natural meaning of it is, a channel in which water flows, and that the grant of a right to make a watercourse may include the right to fill it with water, and use the water flowing in it when made.

Looking at the terms of the reservation, and the purposes for which it was made, and the lack of any suggestion that water would be required to be conveyed from any other source, their Lordships think that the right to make the watercourse in the present case included the right to divert the water from the streams in the appellant's land into it, and to use the water so diverted.

On the other point they agree with the Chief Justice, that, if it be held that the watercourse was made by the Government, it was not necessary for the respondent to shew that it was made under an order of the Government.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Atkinson & Dresser.*
Solicitors for respondent: *H. D. Kimber & Co.*

[PRIVY COUNCIL.]

ESQUIMALT AND NANAIMO RAILWAY COMPANY . . . . . } DEFENDANTS ;

AND

BAINBRIDGE . . . . . PLAINTIFF.

J. C.*
1896
July 9, 28.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Act 47 Vict. c. 14, s. 3—Act 54 Vict. c. 26—Free Miner's Certificate—Construction—Mines and Minerals—Precious Metals.

By s. 3 of the British Columbia Act (47 Vict. c. 14), land was granted to the Dominion Government, the appellant company's predecessor in title, "including all mines, minerals, and substances whatsoever thereupon, therein, and thereunder":—

Held, in an action for wrongful ejectment by the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 Vict. c. 26), applicable to a part of the land granted, that he was entitled to mine for gold and other precious metals thereon, the above words not being sufficiently precise to transfer to the appellants' predecessor the right of the provincial legislature to administer the precious metals in the lands assigned.

APPEAL from an order of the Full Court (Aug. 7, 1895), affirming an order of Drake J. (Oct. 17, 1894), whereby it was adjudged that the respondent was entitled to enter on and mine the lands of the appellants upon complying with the conditions contained in s. 11 of the Placer Mining Act of 1891.

The question in issue was as to the right of the appellants to the mines of precious metals within the belt of land granted to them by the Crown, as represented by the Dominion of Canada, for the purpose of constructing and to aid in the construction of their railway.

The facts are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *W. H. Clay*, for the appellants, contended that the letters patent under the Great Seal of Canada, dated April 21, 1887, under which the Crown, after reciting the local Act 47 Vict. c. 14, and the Dominion Act

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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(47 Vict. c. 6), granted to the appellants the precious metals contained in the lands in suit. According to the true construction of those Acts, a grant of those lands effected a grant of the gold, silver, and precious metals therein and thereunder. The words "mines, minerals, and substances whatsoever," used in both Acts, are apt and precise words, in order to sever from the title of the Crown and to vest in the appellants the mines in question. As to the construction of the word "mine," see "The Gold Mining Ordinance, 1867," of British Columbia, Consolidated Acts, 1877, c. 123, s. 1; and as to "minerals," see the same Consolidated Acts, c. 126, s. 1. Compare the "Mineral Act" (1884, c. 10, s. 154), (Consolidated Acts, 1888, c. 82), as to both words. The precious metals being vested in the appellants, the respondent was not entitled to enter upon the land for the purpose of locating or working a placer claim either under the "Land Act, 1875" (Cons. Acts, 1877, c. 98, s. 80), or the "Land Act, 1884," c. 16, s. 75 (Cons. Acts, c. 66, s. 95). Placer claims could not be lawfully located or recorded on the appellants' land having regard to the terms of their grant without their consent. The word "lands" in the "Placer Mining Act, 1891," s. 10, does not include lands in which the precious metals have been previously granted away by the Crown. Reference was made to *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1); Chitty on Prerogative, p. 294; *Woolley* v. *Attorney-General of Victoria*. (2)

Bigham, Q.C., Eberts, Q.C. (Attorney-General of British Columbia), and *C. A. Russell*, for the respondent, contended that the words in the local Act, 47 Vict. c. 14, relied upon were not intended to vest the precious metals in the lands in suit in the appellant. They were not in themselves sufficiently precise for that purpose. The right of mining for them, therefore, remained in the provincial legislature; and the respondent, under the terms of the Placer Mining Act, 1891 (54 Vict. c. 26), having complied with the conditions contained in s. 11, was entitled to enter upon the lands for that purpose. The respondent's case rested solely on this, that the letters patent did not and were not authorized to make any reference to the precious

(1) 14 App. Cas. 295. (2) 2 App. Cas. 163, 166.

metals, and that "mines, minerals, and substances whatsoever" could not be deemed to include them.

Cozens-Hardy, Q.C., replied.

1896. July 28. The judgment of their Lordships was delivered by

LORD WATSON. The respondent in this appeal is the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 Vict. c. 26), authorizing him to work the "Blue Ruin" claim, 100 by 100 feet, which is situate within lands in Vancouver Island belonging to the appellant company. The Act of 1891 by s. 10 gives the holder of such a certificate the right to mine for gold and other precious metals "upon any lands in the Province of British Columbia, whether vested in the Crown or otherwise, except upon Government reservations for town sites, land occupied by any building and any land falling within the curtilage of any dwelling-house, and any orchard and any land lawfully occupied for placer mining purposes, and also Indian reservations." By s. 11 the free miner is bound to give adequate security to the satisfaction of the Gold Commissioner for any loss or damage which may be caused by his entry, and to make full compensation to the occupant or owner of the lands for any loss or damage which may be caused by reason of his entry; such compensation, in case of dispute, to be determined by a Court having jurisdiction in mining disputes, with or without a jury.

The appellant company ejected the respondent from the land specified in his certificate, which he had entered upon for the purpose of gold mining; whereupon he brought the present suit against them before the Supreme Court of British Columbia, in which he concludes (1.) for damages, and (2.) for an injunction restraining them from interfering with his working, for gold and other precious metals, the "Blue Ruin" claim, as described in his certificate. The defence to the action is disclosed in an affidavit filed by James Dunsmuir, the president of the appellant company. Omitting details, the substance of the allegations made in defence is, that the company were, before the issue of the respondent's certificate, fully vested with

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the whole right and interest of the Crown to and in the mines of gold and other precious metals within the whole lands belonging to them in Vancouver Island, including the land embraced in the respondent's " Blue Ruin " claim.

Accordingly, the main if not the only question arising for decision is: Whether the appellant company have right to the mines of gold and other precious metals which may exist within their lands. Drake J., before whom the case was tried, has found that they have not, and has ordered and adjudged that the respondent is entitled to enter upon and mine the lands belonging to them upon complying with the conditions contained in s. 11 of the Placer Mining Act of 1891. On appeal, his judgment has been unanimously affirmed by the Full Court, consisting of Crease, McCreight, and Walkem JJ. The respondent does not maintain that his free miner's certificate would give him any right to enter and work if it were held that the gold and other precious metals in the lands of the appellant company are their property.

The circumstances under which the title of the appellant company to gold and other precious metals is asserted are as follows. By Order of Her Majesty in Council, dated May 16, 1871, the Province of British Columbia was admitted into the federal union of Canada, in terms of s. 146 of the British North America Act, 1867, subject to articles of union which had previously been agreed to by the Governments of the Dominion and the Province, and sanctioned by their respective legislatures. These articles included an undertaking by the Dominion to construct a line connecting the Canadian Pacific Railway with the sea-board of Vancouver Island; in consideration of which, the Government of British Columbia became bound to grant to the Dominion, (1.) a belt of land twenty miles in width, on either side of the new railway, across the mainland of the Province, and (2.) a large area of land in Vancouver Island, described by boundaries which it is unnecessary, for the purposes of this appeal, to refer to.

The railway has been made in terms of the undertaking given by the Dominion Government, who delegated its construction to the appellant company. The relative obligations

of the Government of British Columbia were sanctioned, and given effect to, by the British Columbia Act, 47 Vict. c. 14. Sect. 2 of that Act granted to the Dominion Government the public lands along the line of railway to a width of twenty miles on each side of the line. Sect. 3 granted to the Dominion Government the area of land in Vancouver Island, already mentioned, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder."

On August 20, 1883, an agreement was made between the promoters of the appellant company and the Government of the Dominion, to the effect that the company, when formed, should construct the line now known as the Esquimalt and Nanaimo Railway. After the incorporation of the company the agreement was sanctioned by the Dominion Act (47 Vict. c. 6), which also authorized the Governor in Council to grant to the company all the lands situated in Vancouver Island which had been granted to Her Majesty for behoof of the Dominion, by the Legislature of British Columbia, in aid of the construction of the railway, "and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever in, on, or under the lands so to be granted to the said company." In pursuance of that statutory authority, the Dominion Government, by deed under the Great Seal of Canada, dated April 21, 1884, granted and assigned to the appellant company, inter alia, all the lands and minerals in Vancouver Island which had been granted to that Government by s. 3 of the British Columbia Act (47 Vict. c. 14). The extent of the appellant company's interest in these lands and minerals must therefore be determined by reference to the terms of that clause.

In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) it was held by this Board that s. 2 of the British Columbia Act, which relates to the lands comprised in the forty-mile belt, did not give the Dominion Government any right to gold and other precious metals in those lands, which were held by the Crown under its prerogative title. The 2nd

(1) 14 App. Cas. 295.

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section, which alone was considered in that case, makes no mention of, and does not profess to grant any subject, other than "public lands." The appellant company, whilst admitting that apt and precise language is necessary in order to alienate the prerogative rights of the Crown, rely upon the enumeration of minerals which is coupled with the grant of lands in s. 3 as sufficient to shew the intention of the Provincial Legislature to transfer to the Dominion Government their right to administer the precious metals in these lands.

The words relied on are, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder." The only expressions occurring in that enumeration which can possibly aid the argument of the appellant company are "mines, minerals, and substances." Not one of these expressions can be rightly described as precise, or, in other words, as necessarily including the precious metals. According to the usual rule observed in the construction of the concluding and general items of a detailed enumeration, they may be held to signify alia similia with the minerals or substances previously enumerated; and it appears to their Lordships to be sufficient for the decision of the present case that they may be aptly limited to minerals or substances which are incidents of the land, and pass with the freehold.

Being of the same opinion with the learned judges in both Courts below, in whose reasoning they concur, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The respondent's costs of this appeal must be paid by the appellant company.

Solicitors for appellants: *Hepburn, Son & Cutcliffe.*
Solicitors for respondent: *Gard, Hall, & Rook.*

[PRIVY COUNCIL.]

HENTY AND ANOTHER . . . . . APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.*
1896
June 26;
July 28.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Administration and Probate Act, 1890, *s.* 97, *sub-s.* 2—*Statement by Executors—Debts chargeable on Foreign Assets.*

Held, that, under s. 97, sub-s. 2, of the Administration and Probate Act of 1890, the statement which an executor is required to furnish relates to all assets within the Colony of Victoria, and to such debts as are properly chargeable on these Colonial assets in assessing them for duty so as to shew the assessable balance in the Colony.

Consequently, where the testator was domiciled in Victoria but had foreign assets, these latter, to which Victorian probate gives no title, need not be stated, nor any debts chargeable thereon except so far as they are in excess of the security, and to the extent of that excess are chargeable on the Victorian assets.

Blackwood v. *Reg.* (8 App. Cas. 82) followed.

APPEAL from a judgment of the Supreme Court (Aug. 22, 1895) dismissing a petition by the appellants for the return of duty paid under the Administration and Probate Act, 1890 (54 Vict. 1060), in respect of the estate of one Stanbridge, the testator, who at the time of his death and previously was domiciled in the Colony of Victoria.

The question in the appeal was whether for the purposes of the statement required to be made by the executors a debt of the testator locally situate in the Colony, but secured upon real estate not situated in the Colony, was to be treated as a deduction from the colonial assets.

The facts are stated in their Lordships' judgment.

Hodges J. decided against the executors' right to make such deduction, holding that the case was governed by *Virgoe* v. *Reg.* (1)

* *Present:* LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.

(1) 11 Vict. L. R. 517.

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Cozens-Hardy, Q.C., and *Stone*, for the appellants, contended that *Virgoe's Case* (1) was wrongly decided. Sect. 97 of the Act of 1890 re-enacts with variations s. 7 of the Duties on the Estate of Deceased Persons Statute, 1870, to which reference was made in *Virgoe's Case.* (1) Previous to the Act of 1870 real estate did not pass to an executor. It was contended that the debt sought to be deducted in this case was a local debt in the Colony—that the mortgage deed which secured it was at the time of the testator's death locally situate in the Colony. Probate is only granted by the Supreme Court in respect of property within the Colony. Duty is only payable in the Colony on assets which are in the Colony. On the true construction of s. 97 the statement required thereby deals only with real and personal estate within the Colony; and the amount of this is affected by the existence of debts which the deceased was personally liable to pay. It is not within the terms or meaning or spirit of the Act to impose duty on property situate out of the Colony, which result would in effect follow from the judgment of the Supreme Court, which by refusing a legitimate deduction from the Colonial assets because of the existence of foreign assets indirectly brought those foreign assets within the operation of the Act. Reference was made to *Blackwood* v. *Reg.* (2); *Laidlay* v. *Lord Advocate* (3); *Beaver* v. *Master in Equity* (4); *Virgoe* v. *Reg.* (1)

Haldane, Q.C., and *Bray*, for the respondent, contended that s. 97 of the Act of 1890, sub-s. 2, draws a distinction between secured and unsecured debts. It requires the nature of the security to be stated, indicating, it was submitted, that a deduction could only be made for a debt to the extent to which it was unsecured. So far as the debt was secured, the security operated to diminish the value of the assets whether Colonial or foreign on which it was charged. In this case the judgment proceeded on the grounds that the debt sought to be deducted was a fully secured debt, that under the section no deduction could be made for a fully secured debt, and that it made no difference whether the security was in Victoria or in a foreign

(1) 11 Vict. L. R. 517.
(2) 8 App. Cas. 82.
(3) 15 App. Cas. 468.
(4) [1895] A. C. 251.

country. Sub-s. 1 of s. 97 fortifies sub-s. 2, for it provides that in the case also of grant of letters of administration no deduction shall be made for secured debts except to the extent to which the security is insufficient. As assets out of the Colony need not be stated, debts charged on such assets cannot be deducted from the colonial assets. It was contended that *Virgoe* v. *Reg.* (1) was rightly decided.

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Cozens-Hardy, Q.C., replied.

The judgment of their Lordships was delivered by

1896 July 28.

LORD WATSON. The late William Edward Stanbridge, who had his domicil of succession in the Colony of Victoria, died there in April, 1894, leaving a last will, dated February 24, 1892, by which he appointed the appellants, Henry Henty and Thomas Colles, to be executors and trustees of the will. The appellants accepted office, and duly obtained probate, with the will annexed, from the Supreme Court of Victoria, which conferred upon them an administrative title to the whole estate of the deceased, real or personal, situated in the Colony. In terms of the Administration and Probate Act, 1890 (54 Vict. c. 1060), it became incumbent upon the appellants to file a statement of the particulars of the estate thus placed under their administration, in order to the assessment of the Government duties payable in respect thereof, under the seventh schedule of the Act.

Besides real and personal estate in the Colony, the deceased was, at the time of his death, possessed of an interest in certain freehold, leasehold and licensed lands, situated in the Colony of New South Wales, known as the Gogeldrie Station, which had been purchased, in three equal shares, from George Henry Hebden and Charles Spencer Bransby Hebden, by the deceased and two persons of the name of Waugh, in the year 1889. At the time of their purchase these lands were affected by a mortgage for the principal sum of 50,000*l.*, with interest, which had been granted by the sellers to Dalgety & Co., a limited company carrying on business in the city of Melbourne. It was a

(1) 11 Vict. L. R. 517.

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condition of the sale that the lands should be transferred under burden of the mortgage; and, in pursuance of that arrangement, the three purchasers, including the deceased, on May 19, 1891, entered into a deed of covenant with Dalgety & Co., Limited, by which they jointly and severally undertook to fulfil the personal obligations contained in the mortgage for repayment of principal and interest, whilst Dalgety & Co. discharged the original obligees. It is not immaterial for the purposes of this case to observe that the appellants have not in the course of the proceedings alleged that the real security held by Dalgety & Co., Limited, is insufficient.

The appellants, in pursuance of the Act of 1890, lodged a detailed statement, shewing all assets in the Colony falling under their administration, and also purporting to shew the liabilities attaching thereto, which they had to discharge in due course of administration. The Crown, who is the respondent in this appeal, takes no exception to the principle upon which the statement is framed. It concedes, and the appellants did not dispute, that the statutory object of such a statement is to disclose, on the one hand, the amount and value of the deceased's assets in the Colony falling within the probate, and, on the other hand, all liabilities which the executors, in the course of their colonial administration, may be required to satisfy out of these assets; and that probate duty is payable upon the amount, if any, by which the value of the assets exceeds these liabilities. No question has been raised by the Crown as to the correctness of that part of the appellants' statement which sets forth the amount and value of the real and personal estate of the deceased within the Colony. The controversy in this appeal is confined to a single item in that part of the appellants' statement which professes to disclose the liabilities which ought to be borne by the assets which they administer. Inasmuch as that item considerably exceeds the total value of the assets, the result of its being admitted would be to leave no balance upon which probate duty is payable.

The appellants claim the right to treat as a liability, and to deduct from the value of the assets, the sum of 50,000*l.*, together with 945*l.* 4*s.* 1*d.* of interest accrued thereon, being

the debt due to Dalgety & Co., Limited, as constituted by their mortgage over Gogeldrie Station, and the relative deed of covenant between the company and the purchasers of the station. The assessing officer disallowed the claim, and charged the appellants with probate duty upon a balance of assets calculated on that footing. The appellants paid the duty, and then brought the present suit for its repayment.

The case was tried on August 22, 1895, before Hodges J., who ordered judgment to be entered for the Crown with costs. The present appeal is taken against that order. The learned judge did not assign any reasons for his decision, it having been admitted by the parties that the case was covered by the decision of the Full Court in *Virgoe* v. *Reg.* (1) In that case the facts were very similar; and although its decision depended upon certain provisions of the Duties on the Estates of Deceased Persons Statute (Act No. 388 of 1870), these provisions have been substantially re-enacted by the Administration and Probate Act, 1890, which governs the present case.

By s. 97, sub-s. 2, of the statute of 1890, it is enacted as follows:—

"Every executor and every administrator with the will annexed shall, within the prescribed time from the grant of probate or letters of administration to him, or such further time as the master may allow, file in the office of the master a statement specifying the particulars of the personal estate of or to which the deceased was at his death possessed or entitled, and of the real estate comprised in such will and the value thereof, and of the debts due by the deceased, distinguishing between secured and unsecured debts, and stating the nature of the security held for the same and the estimated value of such security, and shewing the balance remaining after deducting the amount of the debts from the value of the estate of the testator. Secured debts shall mean any debts in respect of which there exists any mortgage charge or lien on the testator's or intestate's real or personal estate."

The sub-section is obviously framed in general and comprehensive terms, so as to meet the exigencies of every case that

(1) 11 Vict. L. R. 517.

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can come within its scope; but it does not, in their Lordships' opinion, necessarily follow that the expressions real and personal estate, and secured and unsecured debts must in every case mean the whole estate of the deceased, and his whole debts secured or unsecured. Real and personal estate must, in their opinion, signify all assets within the Colony, which alone are chargeable with duty, according to the decision of this Board in *Blackwood* v. *Reg.* (1), which construed similar enactments in the statute of 1870; and debts of the deceased, secured or unsecured, must refer, not to the whole debts of the deceased, but to such debts as are properly chargeable upon these colonial assets in assessing them for duty. Were those expressions otherwise interpreted, the whole purpose of sub-s. 2 would be defeated. The statement filed would not shew the assessable balance in the Colony, although it might contain the materials from which a statement shewing such balance could be extracted. The debts falling to be deducted, in assessing duty, from Victorian assets will necessarily vary according to circumstances. When the deceased died domiciled in Victoria, and had no estate outside the Colony, the whole of his property, real or personal, and the whole of his debts, which in that case are domiciled with him, must be disclosed in the statement. When the deceased died domiciled in another country, but had assets situated in Victoria, his Victorian assets must be fully stated, and from these are to be deducted, for the purpose of ascertaining the amount liable to colonial duty, only those debts which are Victorian. It was so held by the Supreme Court of the Colony in *Reg.* v. *Smith.* (2) In a case like the present, where the deceased was domiciled in Victoria, but had estate in another country, the purposes of the Act do not require that his executors shall include foreign assets, to which their Victorian probate gives them no title, although, in such a case, there may be debts due by the deceased to foreigners which, for the purpose of assessing duty, form a legitimate charge upon the assets reached by their probate.

Keeping in view the main and only purpose of s. 97, sub-s. 2, which is to compel a statement of assets and liabilities by the

(1) 8 App. Cas. 82. (2) 9 Vict. L. R. 404.

executor or administrator, which will enable the proper officer to assess the amount or value of the Victorian assets chargeable with duty, their Lordships are of opinion that it was not incumbent upon the appellants to set forth the value of the deceased's interest in the Gogeldrie Station, and that they were not required to state, and are not entitled to deduct, any debt secured upon his estate in New South Wales. That view was maintained by the counsel who represented the respondent, and it was accepted by counsel for the appellants, to this extent, that they were under no obligation to state the value of the deceased's interest in Gogeldrie Station. The only point upon which the parties were at issue related to the right of the respondents to deduct the amount of the mortgage debt due to Dalgety & Co., Limited, from the free assets in Victoria.

If a debt for which he was personally bound has been made a valid charge upon particular estate belonging to the deceased, it is not, if the security be sufficient, in any sense chargeable upon the other free assets left by him. In any question as to probate duty, it is a burden which adheres to and tends to diminish, or it may be to extinguish, the value of the asset upon which it is charged. The mortgage debt in question will diminish the value of the deceased's interest in the Gogeldrie Station for fiscal and other purposes in New South Wales; but there is no reason why it should diminish the value of his assets for the purpose of probate duty in Victoria. If the amount of the mortgage debt had exceeded the value of the station upon which it is secured, to the extent of the excess it would have been an unsecured debt, and might have to that extent constituted a debt for which the appellants were, in the circumstances of this case, entitled to take credit. But the appellants have not shewn, and have hardly attempted to suggest, any legal ground upon which they would be justified, in the course of their Victorian administration, in making payment of any part of the mortgage debt to Dalgety & Co., Limited.

Counsel for the appellants, in order to avoid the difficulties which they had to encounter if the mortgage were treated as a secured debt, and therefore as only affecting the value of a New

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South Wales asset of the deceased, chiefly based their argument upon the view that, by the terms of sub-s. 2, it ought to be regarded as an unsecured debt, resting upon the personal obligation undertaken by the deceased in the deed of covenant. The reasons urged in support of that view were that the debt, in so far as the Colony of Victoria was concerned, was simply personal, that the creditors and their documents of debt were in Melbourne, and that, in terms of the mortgage and deed of covenant, payment was to be made to them in Melbourne. Their Lordships must observe that even if that argument were well founded they cannot understand upon what principle the appellants could claim to deduct the full amount of the debt from the Victorian assets of the deceased. He had two co-obligants, whose solvency is not impeached and who have given security to their common creditor for the fulfilment of their personal obligations. It is needless to dwell upon that point, because it is contrary to fact to suggest that the debt is unsecured; and, according to the principles recognised by this Board in *Walsh* v. *Reg.* (1), the security held by Dalgety & Co. is as much an asset in New South Wales as the real estate there which it affects. Their Lordships can find no ground for the contention that a debt for which the creditor holds ample security elsewhere can be treated as unsecured, for the purpose of reducing the dutiable value of assets in Victoria.

For these reasons their Lordships will humbly advise Her Majesty to affirm the order appealed from. The costs of this appeal must be borne by the appellants.

Solicitors for appellants: *Stones, Morris & Stone.*
Solicitors for respondent: *Freshfields & Williams.*

(1) [1894] A. C. 144.

[PRIVY COUNCIL.]

GOULD . . . . . DEFENDANT; J. C.*, 1896 July 3, 7, 28.

AND

STUART . . . . . PLAINTIFF]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Civil Servants of the Crown—Power to dismiss at pleasure—Civil Service Act, 1884.

The Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided:—

But *held*, that certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the officer, are inconsistent with such a condition, and consequently restrict the power of the Crown in that respect.

APPEAL from an order of the Supreme Court (May 23, 1895), allowing a demurrer by the respondent to certain pleas of the defendant in an action for 1500*l.* damages against the Government for wrongful dismissal.

The pleas in effect set up that the respondent as a servant of the Crown held office only during the pleasure of the Crown, and that there was nothing in the Civil Service Act, 1884, which prevented the Government from terminating the employment of an officer under it at any time, and that it had been terminated accordingly. The question involved in the appeal was as to the construction of the Act. It was not disputed that up to the time of the passing of the Act the tenure of civil service employment in the Colony was at the pleasure of the Crown. The respondent demurred to the effect that he held office for life or during good behaviour, and could only be dismissed on the special grounds and in the special manner provided by the Act.

The facts are stated in the judgment of their Lordships.

* *Present*:—LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.

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Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for appellant, contended that the Act did not create any exception to the rule that civil servants of the Crown held office only during pleasure. The Act did not either expressly or by implication change the nature of civil servants' tenure of office. The whole tenor of the Act, and especially of ss. 10, 46, and 49, recognise the continuance of such tenure and of the Crown's power to dismiss at pleasure. There are no doubt certain disciplinary regulations in Part III. of the Act, but they are not inconsistent with the continuance of the general common law rule as to tenure: see ss. 32, 38. It was contended that final dismissal under the Act could co-exist with dismissal at pleasure. An express authority to inflict the one did not imply that the other was abolished. The construction of the Act adopted by the Supreme Court was unwarranted by its terms, would interfere with an existing prerogative, alter the terms of contracts existing at the time it was passed, and lead to grave public inconvenience. Reference was made to *Shenton* v. *Smith* (1) and to *Dunn* v. *Reg.* (2)

The respondent did not appear.

1896 July 28.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The respondent in this appeal entered into the service of the Government of New South Wales under and in accordance with the provisions of the Civil Service Act, 1884, of that Colony as a clerk at a yearly salary. Before his service had been determined in a manner prescribed by the Act, the Government dismissed him. On March 7, 1895, he brought a suit to recover damages for the dismissal against the appellant, who had been duly appointed to be sued as nominal defendant on behalf of the Government in the matter of that claim. The appellant pleaded that when the plaintiff was engaged as clerk he was not nor had he since been reasonably competent to perform the service for which he was engaged, wherefore the Government rescinded the contract and dismissed him. And for another plea the appellant said that the plaintiff misconducted himself in the service by wilfully disobeying the reason-

(1) [1895] A. C. 229. (2) [1896] 1 Q. B. 116.

able orders of the Government and by habitually neglecting his duties and failing to perform them, wherefore they dismissed him. The plaintiff demurred to these pleas; and the defendant gave notice that on the argument of the demurrer he would object to the declaration on the grounds—(1.) that it did not disclose any cause of action; (2.) that there is nothing in the provisions of the Civil Service Act which prevents the Government from terminating the employment of an officer under it at any time. The Supreme Court of New South Wales gave judgment for the plaintiff on the demurrer, and the present appeal is from that judgment.

It is the law in New South Wales as well as in this country that in a contract for service under the Crown, civil as well as military, there is, except in certain cases where it is otherwise provided by law, imported into the contract a condition that the Crown has the power to dismiss at its pleasure: *Dunn* v. *Reg.* (1); *De Dohse* v. *Reg.* (2) The question then to be determined is, Has the Civil Service Act, 1884, made an exception to this rule? Part I. of the Act provides for the classification of officers according to their salaries, the increase of salaries, and the appointment of a Civil Service Board. Part II. provides for the examination, appointment, and promotion of candidates for admission to the service. Part V. for superannuation allowances, in which according to s. 48 an officer is not entitled to a superannuation allowance until he has served fifteen years. Part VI. for the creation of a Civil Service Superannuation Fund, to which every officer is made to contribute by a deduction of 4 per cent. from his salary. Sects. 10 and 49, which were referred to in the argument for the appellant, are not applicable to the present case. Sect. 10 provides for the services of an officer being dispensed with in consequence of the abolition of his office or of any departmental change and not from any fault on his part; and s. 49 to any officer not entitled to a superannuation allowance whose services may be dispensed with through no fault of his own, or who may be compelled through infirmity of body or mind to leave the service, giving power to the Governor

(1) [1896] 1 Q. B. 116. (2) [1896] 1 Q. B. 117, n. (7).

J. C. 1896 GOULD v. STUART.

to grant a gratuity to him. The provisions in Part III. are the most material in the present case. Sect. 32 provides for the suspension of any officer who in the opinion of the Minister or of any officer authorized by him to investigate any matters or accounts pending a report shall have committed any act which appears to him to justify suspension; but if the suspension is not made by the Minister, the officer making it is immediately to lay before the Minister a report stating his reasons for the suspension, and the Minister may either confirm it or restore the officer to his office. Then s. 33 enacts that if the Minister orders or confirms the suspension he shall report the same to the Governor, who, after calling on the officer to shew cause or make explanation, may remove the suspension, or according to the nature of the offence dismiss the officer from the service, or reduce him to a lower class therein or to a lower salary within his class, or deprive him of such future annual increase as he would otherwise have been entitled to receive or any part thereof during any specified time, or punish him by fine not exceeding 50*l.*; provided that the Governor before deciding may direct the board, or appoint one or more persons to inquire into the matter, with authority to receive evidence and to summon and examine witnesses on oath. Sect. 34 provides for punishment by fine not exceeding 10*l.* of an officer who is negligent or careless in the discharge of his duties; s. 35 for the summary dismissal of any officer convicted of felony or any infamous offence, and the forfeiture of his office by becoming bankrupt or applying to take the benefit of an Insolvent Act, or making an assignment for the benefit of his creditors; and s. 37 for fine, suspension, or dismissal in case of dishonourable conduct or intemperance. These provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless, and delusive. This is, in their Lordships' opinion, an exceptional case, in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualification of the members of it, and

that some restriction should be imposed on the power of the Crown to dismiss them.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the Supreme Court and to dismiss the appeal.

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Solicitor for appellant: *George M. Light.*

[PRIVY COUNCIL.]

WILLIAM HOWARD SMITH & SONS, LIMITED . . . . . } DEFENDANTS;

AND

WILSON . . . . . PLAINTIFF.

J. C.* 1896 *May* 8; *June* 10, 27.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Marine Act, 1890, *s.* 13—*Liability to clear a Port of Sunken Ship—Registered Owners.*

Sect. 13 of the Victorian Marine Act, 1890, differing in that respect from s. 56 of the English Harbours, Docks, and Piers Clauses Act, 1847, imposes, according to its true construction, upon the owner or master of any ship sunken within a port, the duty of clearing the port thereof, or of reimbursing the statutory officer the expenses incurred by him for that purpose:—

Held, that the registered owner of the ship at the date of the occurrence cannot escape liability by abandoning the wreck to the underwriters, who, although they become at common law owners of the wreck, are not within the terms of the section.

The Crystal ([1894] A. C. 508) distinguished.

APPEAL from an order of the Supreme Court (April 10, 1895) in favour of the respondent discharging an order nisi to review an order for payment by the appellants of 3058*l.* made by the justices at petty sessions at Port Melbourne.

The facts and proceedings are stated in the judgment of their Lordships.

Sir W. Phillimore, Q.C., and *Herbert Williams*, for the appel-

* *Present:* LORD HALSBURY L.C., LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

J. C. 1896 HOWARD SMITH v. WILSON.

lants, contended that they were not the owners of the ship in question within the meaning of s. 13 of the Marine Act, 1890, at the time when the notices concerning the removal were given by the respondent on September 5 and October 6, 1891, nor at the time when the operations for the removal thereof were begun. The appellants had on August 28, 1891, abandoned all their right and interest in the ship, and all possession of and control over the same, and gave written notice of abandonment to the insurance companies concerned, and since that day the appellants had not in any way exercised any right or control over ship or cargo, but on the contrary had on September 21, 1891, received from the insurance companies the full amount of insurance money as for the total loss of the ship. The underwriters had become, therefore, the owners of the wreck during the time of its removal within the terms of the section, if being destroyed by explosives could be called removal within the terms of the section. The statutory liability devolved upon them and not on the appellants, whose ownership had ceased, though no doubt it was registered and attached to the ship so long as it had continued to be navigable as a ship. Reference was made to *Barraclough* v. *Brown* (1), which was under appeal to the House of Lords; *Rex* v. *Watts* (2); *Brown* v. *Mallett* (3); *White* v. *Crisp* (4); *The Utopia* (5); *The Crystal* (6), referred to in the judgment of the Court below, and there distinguished having regard to the different terms of the English and the Colonial Acts: the English Act being the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 56; and to *The Edith* (7), an Irish case, cited in *The Crystal* (6); see also *Ramsden* v. *Payne* (8); *Musgrove* v. *Mitchell.* (9)

Cohen, Q.C., and *Bray*, for the respondent, contended that the statutory liability attached to the appellants, who were the owners contemplated by s. 13 of the Marine Act, 1890, having

(1) 65 L. J. (Q.B.) 333.
(2) 2 Esp. 675.
(3) 5 C. B. 599.
(4) 10 Ex. 312.
(5) [1893] A. C. 492.
(6) [1894] A. C. 508.
(7) 11 L. R. Ir. 270.
(8) 1 Vict. L. R. Cases at Law, 250, 256.
(9) 17 Vict. L. R. 346.

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been throughout the registered owners, and being also owners at the time when the ship was sunk. The liability attached directly the ship sunk, and remained notwithstanding the subsequent transfer of the property in the wreck to the underwriters, which transfer could not operate as a release or transfer of the liability imposed by the Act. The Marine Act, 1890, consolidated the law relating to passengers, harbours, and navigation, and s. 13 was a re-enactment in identical language of s. 45 of the Passengers, Harbours, and Navigation Act, 1865. In 1875, in *Ramsden* v. *Payne* (1), followed by the case in 17 Vict. L. R. 346, after the Marine Act, 1890, had been passed, s. 45 was construed to mean that the registered owners at the time of the loss, and not the underwriters by whom a subsequent abandonment had been accepted, were the persons charged. After that judicial construction the section was re-enacted, and it should be presumed that the Legislature approved the construction.

Sir W. Phillimore, Q.C., replied.

1896
June 27.

The judgment of their Lordships was delivered by

LORD WATSON. The appellant company were the registered owners of the S.S. *Gambier*, which, on August 28, 1891, was run into and sunk by the S.S. *Easoby* within the limits of the harbour of Port Phillip, in the Colony of Victoria. On the same day the appellants gave due notice to the Southern Insurance Company, Limited, and also to the Commercial Insurance Company, Limited, with whom the sunken vessel was insured, that they abandoned all their interests insured, and claimed payment under their policies for a total loss. Both these companies admitted the claim, and, on September 21, 1891, paid to the appellants the full amount of the policies. On November 2, 1891, the certificate of registration of the *Gambier* was cancelled in consequence of her having become a wreck.

By s. 13 of the Marine Act, 1890, which is No. 1565 of the Consolidated Victorian Statutes of that year, it is enacted: "If any ship be sunk stranded or run on shore in any port within Victoria, or having been sunk shall be permitted so to

(1) 1 Vict. L. R. 250.

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remain, and the owner or master shall not clear such port of any such ship and of every part of the wreck thereof within such time as the port officer harbour master or in their absence the proper officer of customs of or at such port shall by notice in writing require, or shall not give security to the satisfaction of such port officer harbour master or officer of customs for the removal of such ship and wreck within such further time as the said port officer harbour master or officer of customs may appoint, any two justices are hereby authorized and required, upon the complaint of the said port officer harbour master or officer of customs, to issue their warrant for the removing such ship or wreck in such manner as such port officer harbour master or officer of customs shall direct, and for causing the same to be sold and out of the money arising from such sale to defray the expenses of such removal, paying the overplus (if any) to the owner of such ship or if he cannot be found to the Treasurer of Victoria on behalf of such owner; and if the money arising from such sale shall not be sufficient to defray the expenses aforesaid, the excess thereof beyond the proceeds of such sale shall be chargeable to the owner of the ship; and if not paid within twenty days after having been demanded by the authority of the justices aforesaid shall be recovered as hereinafter mentioned."

On September 5, 1891, the respondent, who is port officer for the Colony of Victoria, served a notice upon the appellants, requiring them, as owners of the *Gambier* at the date when she was sunk, to clear the port of the vessel and every part thereof within thirty days from the date of their receiving the notice, and to give security to his satisfaction for the removal of the vessel and the wreck thereof within thirty days from the expiry of that period. The notice further intimated that, in the event of the appellants' failure to comply with these requisitions, application would be made to the justices sitting in petty sessions for a warrant to remove the ship in such manner as the respondent might direct, and for causing the same to be sold in terms of the above section. The appellants did not remove the wreck, or give security; and on October 6, 1891, the respondent, by a second notice, required them to

find security for its removal within thirty days, with the same notification which had been previously made, in the event of their failing to do so. The appellants did not comply with that notice. It is not disputed that, after August 28, 1891, they did not exercise any control over the sunken vessel, or interfere in any way with the wreck.

On November 21, 1891, a complaint and summons at the respondent's instance was issued from the Court of Petty Sessions at Port Melbourne, requiring the appellants to shew cause why a warrant should not be issued authorizing the removal and sale of the wreck in terms of the Marine Act of 1890. After hearing parties, the justices, on December 4, 1891, granted a warrant authorizing the respondent, two months after its date, to remove the vessel and any part of the wreck thereof in such manner as he should direct, and to cause the same to be sold in terms of the statute. In virtue of that warrant, the respondent, between September, 1892, and March, 1893, caused the ship to be blown up by explosives, and sold some portions of the wreck.

On August 18, 1894, the justices, on the application of the respondent, issued a further warrant, which bears that the ship had been removed, and that the expenses of the removal exceeded the money arising from the sale of materials; and also that the appellants were the owners of the ship prior to her removal, and at the time of her being sunk. In these circumstances, the respondent was authorized to make demand upon the appellants for the sum of 3058*l.* 4*s.* 3*d.*, being the amount of the excess.

The appellants then obtained an order nisi from the Supreme Court of the Colony, requiring the respondent to shew cause why the warrant of the justices should not be set aside, on the grounds (1.) that they were not the owners of the ship within the meaning of s. 13 of the Marine Act, 1890, and that, on their abandonment, the property of the ship passed by operation of law to the underwriters; (2.) that the ship had not been removed in manner provided by s. 13, but had been dispersed and destroyed by explosives; (3.) that items amounting to 250*l.* charged by the respondent for lighting were not expenses

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of removal within the meaning of the statute. Two other reasons were stated in the order, but were abandoned in the Court below; and, in the argument upon this appeal, the plea that the ship was not removed in terms of the Act was not insisted in. On April 10, 1895, the Court, consisting of Williams, Holroyd, and Wood JJ., directed that the warrant of the justices should be amended by deducting from the amount ordered to be paid the sum of 106*l.*, being costs of lighting the wreck before its removal began; and, subject to that amendment, discharged the order nisi with costs.

The first and main question arising in this appeal depends upon the construction of the 13th section of the Act which has already been quoted at length. According to the appellants' argument, that clause makes the excess of expenditure incurred by the port officer over receipts derived from sales by him chargeable, not to the person who was registered owner of the ship down to the time of her sinking, but to the person who was owner of the wreck during the time occupied in its removal. The respondent, on the other hand, argues that statutory liability attaches to the person who was owner of the vessel during the last stage of its existence as a navigable ship; and that the port officer has no concern with any one who may afterwards acquire right to the wreck from such owner.

Counsel for the appellants strongly relied upon the recent decision of the House of Lords in *The Crystal.* (1) Their Lordships are unable to regard that authority as a useful aid in interpreting the section which it has become their duty to construe in this appeal. The subject-matter of that section is very much akin to the subject-matter of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, which the House of Lords had to consider in *The Crystal.* (1) Except to that extent, there is very little resemblance between the two clauses. The expressions requiring to be construed are not the same; and the context in which they occur is different. In the British Act of 1847 there is no mention made of a ship, or of the owner of a ship; the terms used are "wreck," and the "owner of the same." And the noble and learned Lords who gave

(1) [1894] A. C. 508.

judgment in the case of *The Crystal* (1) were unable to find, in the context of s. 56, any language indicating the intention of the Legislature to impose upon the owner of a navigable ship, who was not the owner of its wreck, a liability which did not attach to him at common law. For reasons similar, though not the same, their Lordships do not think it would be of any advantage to examine the bearing, upon this case, of the judgments of Mathew J. and the Court of Appeal in *Barraclough* v. *Brown*. (2)

The section of the Victorian Act appears to their Lordships to be framed in terms very different from those which occur in the British statute of 1847. The introductory and leading provisions of s. 13 cast upon the owner of any ship which is sunk, stranded, or run on shore the duty of clearing the port in which it is sunk, stranded, or run on shore of any such ship, and of every part of the wreck thereof. The duty attaches at once, and is made equally imperative, whether the ship continues to be a ship and only requires to be set afloat, or becomes a total wreck and ceases to be a ship; and, what is of greater importance to the present question, the duty is, in either case, imposed upon the owner or master of the ship. Their Lordships are of opinion, and the appellants' counsel hardly ventured to dispute, that in this part of the clause the owner or master referred to is the owner or master of the ship at and before the time of the occurrence which led to her being sunk, stranded, or run ashore. The remaining enactments of the clause are alternative. They make provision for the event of the owner or master failing to perform the statutory duty incumbent upon them, and do not come into operation if that duty be fulfilled. When the owner or his master fail to remove the ship, the port officer is entitled, on his following the procedure prescribed by the clause, to have it removed "in such manner as he shall direct"; and, if the wreck sold does not produce money sufficient to defray the expenses of removal, the deficit is made "chargeable to the owner of the ship." In their Lordships' opinion, the expression "owner of the ship," as it occurs in the second part of these enactments, has the

(1) [1894] A. C. 508. (2) 65 L. J. (Q.B.) 333.

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same meaning which it bears in the first. It is not unreasonable to suppose that the Legislature intended to make the person whom the statute requires to remove the wreck, at his own cost, reimburse the statutory officer by whom it is removed in consequence of his failure; and there is nothing, either in the language of the clause or in the nature of its enactments, to suggest that it was meant to release the shipowner from liability because he neglected his duty.

Their Lordships are accordingly of opinion that the enactments of s. 13, taken per se, have been rightly construed by the Supreme Court. In that view, it becomes unnecessary to rely upon the fact that these enactments were not novel, and that the legislation which preceded them had received judicial construction in *Ramsden* v. *Payne* (1) and *Payne* v. *Fishley*. (2) It is also unnecessary to consider the appellants' argument to the effect that they had at common law ceased to be owners of the wreck, before the commencement of the respondent's operations in September, 1892.

The learned judges of the Supreme Court were of opinion that certain expenses charged by the respondent before February 4, 1892, should be deducted; but, seeing that in the order nisi the appellants had only objected to expenses of lighting, they left the question of such further deduction to the parties. Their Lordships agree upon that point with the learned judges, but do not notice it further, as they do not suppose that an officer of the Colonial Government in the position of the respondent will have any difficulty in acceding to the suggestion made by the Court below.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The costs of the appeal must be borne by the appellants.

Solicitors for appellants: *Harwood & Stephenson.*
Solicitors for respondent: *Freshfields & Williams.*

(1) 1 Vict. L. R. 256. (2) 1 A. J. R. 122; cited in 17 Vict. L. R. 346.

[PRIVY COUNCIL.]

TRINIDAD ASPHALTE COMPANY . . DEFENDANTS;

AND

CORYAT . . . . . PLAINTIFF.

J. C.*
1896
July 3, 28.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Purchaser for Value with Notice—Effect of Recitals in Deed—Notice—Estoppel.

Recitals in a deed are not representations of fact on the faith of which a stranger to the deed is entitled to act without inquiry.

Where the plaintiff, a purchaser of a legal estate, had express notice that the defendants obtained possession of the land bought under a deed which purported to convey to them an equitable title thereto :—

Held, that he must convey the legal estate to the defendants. Erroneous recitals in the deed as to the derivation of the equitable title actually transferred did not estop the defendants or vitiate the notice.

APPEAL from an order of the Supreme Court (March 12, 1895) affirming a decree of Nathan J. (June 1, 1894).

The facts are stated in the judgment of their Lordships.

Haldane, Q.C., G. Lawrence, and *H. F. Previté*, for the appellants, contended that all the learned judges in the Colony had lost sight of the fact that the conveyance in 1888 from Marie Dernier and Dulcinore to McCarthy operated as a good conveyance by Dulcinore of her equitable title to the land, and that this equitable title had been validly registered under the Colonial Ordinance (No. 3 of 1862) at the office of the Registrar-General of the island. Sects. 1 and 2 were referred to as confirming its force and effect, giving it priority, and rendering immaterial all questions of notice as affecting the respondent who purchased under a later deed in 1892. Otherwise it was shewn that the respondent had actual notice of the title created by the deed of 1888, or alternatively that he wilfully abstained

* *Present:* LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.

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from discovering it. Reference was made to *White* v. *Neaylon*. (1)

Crackanthorpe, Q.C., and *Abraham*, for the respondent, contended that the respondent was admittedly the purchaser from Jean Dernier of the land in dispute, Jean being the brother and heir-at-law of Nicola, the original Crown grantee of the land. The appellants were in possession with a registered paper title, derived from Dulcinore, who had acquired it from Marie, the sister of Nicola, but not his heiress, who was therefore a stranger to the title. The appellants set up an unregistered title derived from Dulcinore as purchaser from Nicola; which was contrary to the terms of the registered deed and has not been proved. The respondent had no notice, actual or constructive, of any such unregistered title. Assuming the appellant to have made out an equitable title as alleged, the recital contained in the deed of 1888 to the effect that McCarthy derived title solely from Marie (who had none) discharged the respondent from any duty (even if such duty was imposed by any rule of equity) to inquire into any other title of the appellants other than that which was created and registered as derived from Marie. The appellants were not entitled to rely on any title other than their registered one as giving to them priority over the respondent's registered conveyance of 1892. Reference was made to *Agra Bank* v. *Barry*. (2)

Haldane, Q.C., replied.

1896 *July* 28.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The facts material for the decision of this case may be stated in a short compass. Nicola Dernier was grantee under the Crown of the land in dispute. One Alexis built a house on it, having acquired from Nicola a sufficient interest for that purpose. In the year 1881 Dulcinore Victor contracted with Alexis and Nicola for the purchase of the land, and she paid for it, and entered into possession, but without any conveyance. Nicola died in 1885. In 1888 Dulcinore agreed to sell the land to McCarthy for thirty dollars, and for that purpose executed a conveyance which was regis-

(1) 11 App. Cas. 171. (2) L. R. 7 H. L. 135.

tered. Marie Dernier, a sister of Nicola, who had lived with him, joined in the conveyance, presumably with the object of passing the legal estate. She however was not Nicola's heir. McCarthy took possession, and his title has passed to the defendants, the Asphalte Company. During these transactions the land was of very small value; but the development of the Pitch Lake which it adjoins has increased its value an hundredfold or so. In the year 1892 the plaintiff obtained a conveyance from the heir of Nicola.

The plaintiff now sues for possession. The defendants claim to be equitable owners in fee, and demand that the plaintiff shall convey the legal estate to them, on the ground that he had notice of their title when he bought the legal estate. Nathan J. at the trial and afterwards the Court of Appeal have decided in favour of the plaintiff. The defendants are now appealing against the decree of the Supreme Court.

The plaintiff's counsel at this Bar have disputed the acquisition of an equitable estate in the property by Dulcinore. It seems to have been hardly, if at all, discussed in the Court below. At the trial Nathan J. spoke of it as apparently true, and did not hint that the reality differed from the appearance. In appeal the learned judges, without intimating any doubt, simply state the fact, and conduct elaborate legal discussions on that basis. Mr. Crackanthorpe has argued that there was no evidence on which the Court could found such a conclusion; but it appears to their Lordships that the evidence is quite sufficient for the purpose.

The case really made by the plaintiff below was that he is a purchaser for value without notice, and that his legal title overrides the equitable interest acquired by the defendants. The argument of his counsel at the trial, so far as reported in the judge's notes, and the judgments in his favour, all turn on the absence of notice to him.

The registered deed of conveyance to McCarthy is in the following terms:—

"Conveyance.

"This deed made this twenty-fifth day of January in the year of our Lord one thousand eight hundred and eighty-eight

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between Marie Accent Damien (1) of the ward of La Brea in the Island of Trinidad spinster of the first part, Dulcimore Victor also of the ward of La Brea aforesaid laundress of the second part and John William McCarthy manager of the Pitch Works at La Brea aforesaid of the third part. Whereas the said Dulcimore (1) Victor some time in the year one thousand eight hundred and eighty-one purchased from the said Marie Accent Damien the hereditaments hereinafter granted and was thereupon let into possession of the same but no deed of conveyance was ever executed by the said Marie Accent Damien. And whereas the said John William McCarthy has lately contracted and agreed with the said Dulcimore Victor for the purchase of the said hereditaments at the price of thirty dollars. And whereas the said Marie Accent Damien has consented to be made a party to these presents for the purposes hereinafter expressed Now this deed witnesseth that in pursuance of the said agreement and in consideration of the sum of thirty dollars as purchase-money to the said Dulcimore Victor paid by the said John William McCarthy on or before the execution of these presents the receipt whereof the said Dulcimore Victor hereby acknowledges the said Marie Accent Damien as beneficial owner at the request and by the direction of the said Dulcimore Victor hereby conveys and the said Dulcimore Victor hereby conveys and confirms unto the said John William McCarthy all and singular that certain piece or parcel of land situate in the ward of La Brea aforesaid measuring seventy-five feet on the northern side thereof seventy-five feet on the southern side thereof and forty feet in width and bounded on the north by lands now or formerly of one Henry Angeas on the south and west by lands of the said Marie Accent Damien and on the east by the Pitch Lake Road. To hold the same unto and to the use of the said John William McCarthy in fee simple.

"In witness whereof the said parties hereto have hereunto set their hands the day and year first herein above written.

"MARIE A. DEMIER. (2)
"DULCIMORE × VICTOR
"Her mark."

(1) *Sic.*

(2) *Sic* in Transcript Record.

This is on the face of it a very careless composition. The names are misstated. Marie is made to convey as "beneficial owner," though it is stated that she had sold to Dulcinore in the year 1881, and though it is Dulcinore and not Marie who is the contracting vendor and the recipient of the purchase-money. Another mistake is made which is not apparent from the deed itself, namely, that Dulcinore is represented as having purchased, not from Nicola as the fact was, but from Marie, who never had any interest.

On the ground of this mistake the learned judges below came to the very startling conclusion that the deed was a nullity; that because Dulcinore did not derive title from Marie, therefore she conveyed nothing at all; and that McCarthy, though he contracted for the purchase, not of any particular interest in the land but of the very land, and not with Marie but with Dulcinore, received nothing at all. At best, they say, the deed took effect as between Dulcinore and McCarthy by way of estoppel. Then they proceed to discuss whether the plaintiff, finding the defendants in possession, was bound to inquire into the nature of their interest, and come to the conclusion that because a system of registration exists in Trinidad he was not so bound.

The plaintiff's counsel here have declined to attempt the hopeless task of supporting this construction of the deed. It is beyond dispute that it transferred to McCarthy whatever interest Dulcinore had. But then they argue, if their Lordships rightly understand them, that this transfer, though absolute in its terms, only operated between grantor and grantee, and that as between the grantee and all other persons, only so much interest passed as Dulcinore derived from Marie, which was nothing at all. This is extremely like a reversion to the repudiated theory of estoppel. Why the deed should be construed differently according to the person who comes to construe it has not been explained, nor can their Lordships comprehend.

The Registration Ordinance has been referred to; but its only bearing on the case is, first, that it gives legal priority to deeds according to the date of their registration instead of the

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date of their execution; and, secondly, that it provides a public office in which they may be seen. Here the defendants' deed was prior in every respect. Nothing turns on the system of registration. There is no question in the case beyond the familiar one, whether the plaintiff had notice, express or other, of the defendants' equity before he bought the legal estate.

Their Lordships have not been able to understand how there can be room for doubt in answering that question. There was the deed, plain for everybody to see. Whatever was in that deed the plaintiff saw and knew. And the deed told him that in the year 1881 Dulcinore purchased the land, and took possession, and that she contracted to sell it to McCarthy, and actually conveyed it to him, and received the purchase-money. Knowing all this, the plaintiff yet asserts that he had no notice of the grantee's equity, because the deed contains an erroneous recital of the mode in which that equity became vested in the grantor.

The plaintiff seems to have imagined that he, a stranger to the deed, was entitled to treat the recitals as indisputable, and to insist that the grantee should not shew the truth of the case if it was contrary to the recitals. He has treated the matter as though some representation had been made to him on the faith of which he had acted. He did not abstain from inquiry. He inquired carefully enough to ascertain that Nicola and not Marie was the owner of the land, and that Marie was not Nicola's heir, and to trace out the heir. And then having got the legal estate he thought he might safely proceed to eject the possessors. But he never inquired in the right and obvious quarter. He must have disregarded the fact disclosed by the deed that Dulcinore purchased and took possession in 1881, when Nicola was living, as the plaintiff, who had searched out the heir, must have known. If he had made inquiry with reference to that fact and to the inference which it suggests, he would probably have avoided the error which led him to bring this suit.

Their Lordships make this remark with reference to the tone of complaint which is taken on the ground that the plaintiff has been deceived by the recitals in the deed; not as intimating

that the case turns on the question whether the plaintiff ought or ought not to have made further inquiry. On that question they only think it right to say that they are not prepared to agree that the existence of a register relieves one who is dealing with a vendor out of possession from ascertaining the interest of one in possession when that possession is in accordance with a registered deed. But they do not rest their judgment on that ground. They rest it on the plain and obvious ground that the plaintiff had express notice that the defendants were transferees of Dulcinore's interest whatever it might be, and that an erroneous recital of her earlier title does not preclude her grantee from shewing what interest really passed by her grant.

The consequence is that the plaintiff's suit entirely fails; and as he has got the legal estate with notice of the defendants' title, he is bound to convey it to them. The proper course will be to discharge the decrees below; to dismiss the plaintiff's claim; to give the defendants judgment on their counter-claim, and to order the plaintiff to pay the whole costs of the suit in both Courts.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

The plaintiff must also pay the costs of this appeal.

Solicitors for appellants: *Sutton, Ommanney & Rendall.*
Solicitors for respondent: *J. N. Mason & Co.*

[PRIVY COUNCIL.]

J. C.* 1896 May 12, 14; June 27.

THE COMMISSIONER FOR RAILWAYS Defendant;

AND

O'ROURKE AND ANOTHER . . . . . Plaintiffs.

AND CROSS-APPEAL.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Costs—Consultations with Counsel—Shorthand notes of Evidence—Expenses of Witnesses.

Where a taxing master had directed (1.) that fees for consultations should be ascertained by the number of consultations allowed, (2.) that costs of witnesses should be ascertained at a uniform rate of fourteen days' subsistence when the witness was examined twice, and seven days when examined only once:—

Held, that the first direction was right, and that the master need not inquire into the length of the consultations and the importance of the occasions on which they were held, but that the second direction was erroneous, for that the case of each witness properly called should be considered, and a reasonable allowance made having regard to the character of his evidence and the probability of his having to be recalled.

Cross-appeals from an order of the Supreme Court (Nov. 10, 1893) confirming an order of Stephen J. ordering a review of certain items of a bill of costs and refusing a review of others.

They related mainly to the principle on which costs of consultations, of shorthand notes of evidence, and of witnesses should be ascertained.

The facts are stated in the judgment of their Lordships.

Asquith, Q.C., *Danckwerts*, and *Roskill*, for the appellant, contended with regard to the two former that they were absolutely within the discretion of the prothonotary, and that his order was not liable to review. On the costs of consultation they cited *In re Brown* (1), and, as to shorthand notes, *Ashworth* v.

* *Present:* Lord Macnaghten, Lord Morris, Lord James of Hereford, and Sir Richard Couch.

(1) L. R. 4 Eq. 464, 466.

Outram. (1) With regard to the costs of witnesses it was contended that there was no rule that witnesses could be detained from the beginning of a trial till after verdict and judgment at the expense of the losing party; that their detention in this case during an arbitration from September, 1886, and later dates, till July 20, 1887, the close of the hearing, and thence till September 10, 1887, the date of the award, was improper and unnecessary. The summoning and detention of witnesses must be governed by the necessities of the case and considerations of prudence, which the plaintiffs had neglected. The prothonotary had taxed the witnesses' allowances fairly and not on any mistaken principle. Reference was made to *Platt* v. *Greene.* (2)

Channell, Q.C., and *Edward Pollock*, for the respondents, contended that the prothonotary taxed the costs on a wrong principle. For instance, the consultations were of a long and unusual nature, and the items consisted of fees bonâ fide paid and fairly required by the magnitude and complication of the case. The prothonotary arbitrarily fixed their amount without reference to the circumstances. The shorthand notes were necessary in the opinion of the tribunal which tried the case: see *In re Hilleary and Taylor.* (3) With regard to the witnesses, taxation should have proceeded on the principle that all witnesses should be maintained during the whole arbitration, and that it lay on the objectors to make out particular exceptions on special grounds. The items for witnesses' expenses had all been bonâ fide paid, and ought not to have been cut down except on some fixed principle and with due regard to the circumstances of each case.

Asquith, Q.C., replied, citing *Croom* v. *Gore* (4); *Lucas* v. *Lackey* (5); *Gravatt* v. *Attwood.* (6)

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The questions in these appeals have arisen in the taxation of costs in an action brought by O'Rourke

(1) 9 Ch. D. 483.
(2) 2 Dowl. 216.
(3) 36 Ch. D. 262.
(4) 25 L. J. (Ex.) 267.
(5) 4 N. S. W. L. R. 28.
(6) 21 L. J. (Q.B.) 215.

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and McSharry against the Commissioner for Railways in the Supreme Court of New South Wales for breach of contract and for work and labour done and materials supplied in the construction of a railway in New South Wales, in which action the plaintiffs claimed to recover 100,000*l.* September 14, 1886, was fixed for the trial; but it was on September 11 postponed to November 15, and again by consent to the 22nd, when an order was made by consent referring the action and all matters in dispute therein to the final determination of three arbitrators, the award of a majority to be binding and to be for a sum certain for the plaintiffs or an award for the defendant. The party in whose favour the award should be was to be at liberty to enter it as the verdict in the cause and to sign final judgment thereon, the costs of the action and the arbitration and of and incidental to the reference and of the award to follow the verdict to be so entered, and to be taxed in the ordinary way. On September 10, 1887, an award was made by two of the arbitrators awarding to the plaintiffs 20,433*l.* 10*s.* 11*d.*, and on October 11, 1887, judgment for the plaintiffs was signed for that sum with interest, and costs to be taxed.

The plaintiffs brought in a bill of costs for taxation amounting to 24,817*l.* 18*s.* 8*d.*, and on September 10, 1888, the Supreme Court, on proceedings taken by the defendant, ordered that judgment should be entered for the plaintiffs for 20,433*l.* 10*s.* 11*d.*, and for the defendant for 79,566*l.* 9*s.* 1*d.*, the residue of the original claim, and declared that it would be competent for the prothonotary of the Court on the taxation of the plaintiffs' costs to satisfy himself by the evidence of the arbitrators or upon such other evidence as might be brought before him as to what parts of the plaintiffs' claim the defendant, having succeeded, was entitled to his costs. The plaintiffs appealed to Her Majesty in Council against this order, and it was on June 30, 1890, reversed, and the cause was remitted to the Supreme Court with directions to the prothonotary to tax the costs of the plaintiffs upon the verdict entered for them pursuant to the award.

Accordingly the costs were taxed by the prothonotary. 16,656*l.* 17*s.* was taxed off, leaving a balance of 8161*l.* 1*s.* 8*d.*,

which was awarded to the plaintiffs as the amount due to them. On August 18, 1891, the plaintiffs gave notice of motion for a rule directing the prothonotary to review his taxation in respect of 367 items in the bill of costs mentioned in a schedule to the notice; and on the 28th the motion was by consent referred to Stephen J. in chambers with liberty to either party to appeal to the Court. On August 3, 1893, Stephen J. ordered that there should be a review of certain enumerated items, and as to all the other items in the schedule there should be no review. Both parties were dissatified with this decision and appealed to the Court, which, by consent, without argument, dismissed both motions, but without prejudice to the right of either party to appeal to Her Majesty in Council. Both parties have obtained the leave of the Court to appeal.

The principal appeal is by the defendant, who appeals from so much only of the order as refers to the items which relate to consultations, shorthand writers' charges, and witnesses' allowances.

There is not in the record any report of the prothonotary; but in the affidavit of A. G. Saddington, a clerk in the Crown Solicitor's office who had the conduct of the matter, he says the prothonotary had informed him that the grounds set forth in the various paragraphs of the affidavit are the grounds (inter alia) on which he disallowed and reduced the various items therein respectively referred to. In the 14th paragraph of the affidavit it is said that about thirty-seven consultations and conferences appear in the bill of costs to have been held and charged for against the defendant, and that the prothonotary allowed thirteen or fourteen consultations and conferences, disallowing the others on the ground that they were unnecessary. In his judgment Stephen J. says he ordered no review as to the number of the consultations, but he thought he must as to the amounts to be allowed, and he did so on the ground that the fees should be estimated according to the length of the consultations and the importance of the occasions on which they were held. If this means that the taxing officer is bound to inquire into the length of each consultation and the occasion on which it was held their Lordships do not agree to it. The

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amount of fees to be allowed for consultations is in the discretion of the taxing officer, and their Lordships do not think that he acted upon a wrong principle if in estimating the fees he took into consideration the number of the consultations which he allowed. A review of the taxation of this part of the bill of costs should not have been ordered.

The next matter is the charge for shorthand writers' notes amounting to 672*l.*, which the prothonotary disallowed. It appears from the affidavit of Mr. McLaughlin, the plaintiffs' attorney, and of the plaintiff McSharry, that it was agreed between the parties that shorthand writers should be employed to take notes of the evidence, and that each party should pay half the cost, and leave it to the prothonotary to say afterwards whether, such notes being necessary, they should be costs in the cause to the successful party. In the circumstances stated in the affidavit it appears to their Lordships that the shorthand notes were necessary, and that the prothonotary was not intended to be the final judge of whether the costs of them should be allowed, but was to decide it as the taxing officer subject to appeal to the Court. It is a case in which the costs ought to be allowed, and as regards them their Lordships are of opinion the order for review was properly made.

The next question relates to the allowances to witnesses. The arbitrators' sittings began on March 29, and ended on July 20, 1887. The award was made on September 10, 1887. The plaintiff McSharry in his affidavit of increase swore he had paid to the witnesses altogether 11,000*l.* In this sum there was 1200*l.* paid to one witness, J. E. F. Coyle, for 323 days. The plaintiff said that on September 6, 1886, Coyle was temporarily in Sydney, where he was on a visit, and that to secure his attendance he had to arrange with him to remain in Sydney during the progress of the case, as if he had not done so he would have left the Colony for his home at Dunedin, where he had since gone, and his evidence would have been lost. The prothonotary disallowed the whole of this charge on the ground that he regarded Coyle as a town witness, and that if he was not the amount should be disallowed on the ground that his evidence was unnecessary, as it might have been

obtained from skilled witnesses resident in Sydney or in the Colony. To another witness, Simpson, a civil engineer, who came from Melbourne, 1137*l.* 3*s.* was paid for 361 days from September 14, 1886, to September 10, 1887. He was examined on three days, and for him fourteen days were allowed. There were other witnesses who were said to have attended for a number of days varying from 386 to fifty, and were charged for accordingly. Others were charged for a lesser number of days. In one of his affidavits referring to his affidavit of increase in which the payments he had made were fully stated, McSharry swore that early in the hearing of the arbitration the arbitrators informed him and his counsel that he was not to let any of his witnesses connected with the works away until the case was closed, as they might want to examine them themselves at any time, and he was also advised by his counsel and solicitor that he could not safely let any of his witnesses away until the arbitrators had made their award; that a number of his witnesses were men who had no fixed place of abode, and who were working principally on railway contracts in the various Australasian Colonies, and he verily believed that if any of these witnesses had been allowed to get out of the jurisdiction of the Courts of New South Wales they would either not have returned at all, or would have been too late to give evidence on his behalf when he had found out where they were.

Stephen J. had before him a tabulated list of the plaintiffs' witnesses with allowances and dates of examination which he had directed to be prepared from the affidavits. It is in the record. Some of the witnesses appear to have been examined once, a few twice, some were sent away after giving their evidence, others remained till the award was made. The prothonotary, as Stephen J. says, seems to have allowed expenses of subsistence at a uniform rate, fourteen days when the witness was examined twice, seven days when examined only once. This is not the way in which the costs of witnesses should be taxed. The prothonotary should act upon no fixed general rule, but should take each case into consideration and determine what was a reasonable allowance to be made for the coming, going, and attendance both at the trial and the

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arbitration of each witness whom he did not consider to have been called unnecessarily, having regard to the character of his evidence and the probability of his having to be recalled. The allowance for the witness Coyle should also be determined according to this rule. Their Lordships are therefore of opinion that the order for review of the items in the schedule to the notice of motion for witnesses' expenses was properly made. The result is that in the principal appeal the order of the Full Court, so far as it relates to the consultations and conferences, should be reversed, and so far as it relates to the shorthand notes and witnesses' expenses should be affirmed, and their Lordships will humbly advise Her Majesty accordingly. No other question was argued in the cross-appeal, and their Lordships will humbly advise Her Majesty that it should be dismissed. The parties will pay their own costs of these appeals.

Solicitor for appellant: *G. M. Light.*
Solicitors for plaintiffs: *Young, Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1895 *July* 26. 1896 *July* 28.

FIELDING AND OTHERS . . . . . DEFENDANTS;

AND

THOMAS . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Law of Nova Scotia—Jurisdiction of Provincial House of Assembly—Immunities of its Members—Order of Imprisonment—Revised Statutes, 5th Series, c. 3.

The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment.

In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment:—

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* *Present:* LORD HALSBURY L.C., LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

Held, that the sections of the local Revised Statutes, 5th Series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are intra vires of the local legislature, as relating to the constitution of the province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognised by the Act of 1867, s. 88.

Barton v. *Taylor* (11 App. Cas. 197) distinguished.

APPEAL from an order of the Supreme Court (Dec. 2, 1893) dismissing the appellants' application to set aside a judgment and verdict in favour of the respondent for $200 damages, and to enter judgment for the appellants.

The circumstances out of which litigation arose were these. The respondent was Mayor of Truro, in the Province of Nova Scotia. Lawrence, one of the appellants, was recorder of the town and a member of the House of Assembly. Lawrence's salary was increased by an Act of the local legislature (54 Vict. c. 119), whereupon the town council exhibited articles of complaint against him, charging him with misbehaviour in his office of recorder and as member of the legislature, and in particular with having promoted the increase of his own salary. The respondent afterwards signed and published a petition, annexing a copy of the articles, in which petition were certain statements reflecting upon the conduct of Lawrence, on whose motion a resolution was passed by the House that the respondent had by such publication been guilty of a breach of the privileges of the House, and should be summoned to attend at its Bar. The respondent contended that his acts complained of were done by him in good faith in his capacity of mayor, and were not libellous. He was ordered to withdraw and remain in attendance, and subsequently ordered to be called in and reprimanded. He refused to obey, and left the precincts of the House; whereupon he was by order of the House arrested by the serjeant-at-arms, brought to the Bar of the House, and directed by the House to be committed to the common gaol of Halifax for forty-eight hours, with a proviso that imprisonment should cease if

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any prorogation supervened. He was imprisoned, but shortly afterwards discharged on a writ of habeas corpus issued out of the Supreme Court.

Two days afterwards, on April 27, 1892, the respondent brought his action against the appellants, all of whom were present at and voted for the passing of the resolution which led to the imprisonment.

The defence rested upon Revised Statutes, 5th Series, c. 3, under which it was contended that the House of Assembly possessed the same privileges, immunities, and powers as were enjoyed by the House of Commons of Canada, and also of the United Kingdom; that by ss. 29, 30, and 33 the House was a Court of Record, with an inherent power to punish insults to or libels on its members during session, and that the appellants possessed the privileges of judges of a Court of Record; that by s. 26 they were exempt from any civil action or damages. Some of the appellants pleaded a special Act of indemnity relating to themselves passed on April 30, 1892, and entitled, "An Act to amend c. 3 of the Revised Statutes of the composition, powers, and privileges of the House."

At the trial the judge ruled that the action must be dismissed as against the appellants protected by the last-mentioned Act; but that as against the others the provisions of Revised Statutes, 5th Series, c. 3, under which they claimed to have proceeded, were not within the competency of the legislature.

On appeal, M'Donald C.J. and Graham E.J. agreed with the first Court that the provisions in question were ultra vires the local legislature, and that the indemnity clause (s. 26) did not apply. Ritchie J. thought that the provisions were not ultra vires, and that the House was sitting as a Court of Record and acting within its jurisdiction, its members being protected accordingly. Weatherbe J. thought that the statute should be construed as empowering the House to deal with matters of crime only as an incident of protecting members in their proceedings; that so construed it was not ultra vires, and was applicable to the proceedings in question. The Court being equally divided, the judgment appealed from was affirmed.

Cohen, Q.C., Longley (Attorney-General for Nova Scotia), and *Lewis Coward*, for the appellants, contended that the House of Assembly had power to commit for contempt committed in the face of the Assembly, and that the respondent had been guilty of such contempt. Reference was made to *Phillips* v. *Eyre* (1) and *Doyle* v. *Falconer*. (2)

[THE LORD CHANCELLOR. Those are cases which illustrate the implied power of the Legislature. Here there is a special Act, and the real question is whether it is intra vires.]

But apart from the special statute, the House of Assembly has powers, inherent in it, necessary for carrying on its business as such, including the power of punishing for contempts committed in the face of the Assembly. With regard to the power of the Assembly, as defined by, or derived from, statute, reference was made to the Imperial Act 28 & 29 Vict. c. 63, s. 5, by which the right of representative colonial legislatures to make laws respecting their own constitution and powers was conferred upon them. The British North America Act, 1867, does not purport to take away such right as regards Canada and its provinces. By s. 1 of 38 & 39 Vict. c. 38, which was substituted for s. 18 of the Act of 1867, the English Parliament defined the powers of the Dominion House of Commons; whilst it nowhere in the Act of 1867 or later defines those of the Assembly of Nova Scotia. But the Dominion House of Commons was created by the Act of 1867; the Nova Scotia House of Assembly existed prior thereto. Before 1867 Nova Scotia was governed by a Lieutenant-Governor and Legislative Assembly, who derived their powers under s. 5 of 28 & 29 Vict. c. 63. By s. 88 of the Act of 1867, the Nova Scotia constitution was continued as it existed at the date of the Union. Its power, therefore, to enact the provisions of Revised Statutes, c. 3, ss. 20 to 40, inclusive (see especially ss. 20, 29, 30, 31, and 33), relied upon by the appellants for their defence in this case, are derived from 28 & 29 Vict. c. 63. Beyond that, the Act of 1867, s. 92—see especially sub-ss. 1, 13, and 15—must be construed as conferring on the provincial legislature the exclusive right to amend the constitution of the province, to make laws

(1) L. R. 6 Q. B. 1. (2) L. R. 1 P. C. 328, 340.

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affecting civil rights in the province, and to impose punishment for violating any law of the province made in relation to any matter enumerated in s. 92. Sect. 91 must be read in conjunction with s. 92, and must not be construed so as to conflict with the fair meaning of s. 92. Reference was made to *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1); *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (2); and to *Citizens' Insurance Co.* v. *Parsons*. (3) It was contended that ss. 20 to 40, both in their general result and in their particular provisions, are amendments of the constitution of the province within the meaning of s. 92. Further, s. 129 was referred to as preserving, and as intended according to its true construction to preserve, to the House of Assembly both the right to pass laws enabling it to commit for contempt and also its existing powers to commit for contempt and breach of its orders.

Edward Blake, Q.C. (of the Colonial Bar), and *Tyrrell Paine*, for the respondent, contended that the provisions of c. 3 of 5th series of Revised Statutes of Nova Scotia were ultra vires the local legislature. The appellants, they contended, could not rely on s. 20 of the Revised Statutes, 5th series, c. 3, because that section only covered cases not specifically provided for. The present case is specifically provided for—if regarded as libel, by s. 29, sub-s. 1; if regarded as contempt for disobedience to an order of the House, by s. 29, sub-s. 3. The respondent's case, however, with regard to both s. 20 and s. 29, is that they are ultra vires. They cannot be supported as being an exercise of the powers given by the Colonial Laws Validity Act, 1865, s. 5, for the definition of colonies given in that Act (s. 1) would not comprise the provinces united into the Dominion of Canada by the British North America Act, 1867. The legislative authority is different; the executive authority is different; the controlling power over legislation is different. Moreover, the effect of the British North America Act is to repeal the Colonial Laws Validity Act so far as the provinces are concerned. The provincial legislatures possess no powers of legis-

(1) [1892] A. C. 437, 441. (2) [1894] A. C. 189, 200.
(3) 7 App. Cas. 96, 107.

lation either inherent in them or dating from a time anterior to the British North America Act: *Bank of Toronto* v. *Lambe*. (1) In order to ascertain what the powers of a provincial legislature are you must refer to s. 92 of the British North America Act. The appellants rely upon sub-ss. 1, 13, and 15 of that section. Sub-s. 1 gives the power to amend the constitution. This, however, does not involve the capacity to take the extraordinary powers purported to be given by the Revised Statutes, 5th series, c. 3. The capacity to take such powers and the power to amend the constitution are different things, and the Imperial Legislature, when they have intended to invest a colonial legislature with the capacity to take such powers, have used apt words for the purpose. See s. 18 of the British North America Act, s. 5 of the Colonial Laws Validity Act, and s. 35 of the Victoria Government Act, 18 & 19 Vict. c. 55. This last-mentioned Act shews conclusively that the power to amend the constitution does not include the capacity to assume such powers as are here claimed, for by s. 60 of the Act the power to amend the constitution is fettered by conditions to which the capacity of assuming such powers is not subject.

With regard to sub-s. 13 of s. 92, which gives the power to make laws in relation to property and civil rights, the powers taken are really an interference with the powers given to the Dominion Parliament. With reference to the criminal law authorized by s. 91, sub-s. 27, whether regarded from the point of view of libel or contempt, the effect of the 20th and 29th sections of the Revised Statutes, 5th series, c. 3, is to legislate as to criminal matters, and the legislation only incidentally relates to civil rights. For this purpose its real object and not its incidental effect must be regarded in order to determine whether it is within the competence of the provincial legislature. Sub-s. 15 of s. 92 has no operation unless the law is primarily in relation to some matter coming within that section. If it is, then no doubt such law may be enforced by fine, penalty, or imprisonment.

If the appellants rely upon s. 30 of the Revised Statutes, 5th series, c. 3, constituting each House of the legislature a

(1) 12 App. Cas. 575, at pp. 587, 588.

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Court of Record, that section is ultra vires both for the reasons given as to ss. 20 and 29 and because it in effect appoints the judges of the Court contrary to the provisions of s. 96 of the British North America Act.

There remains s. 26 of the Revised Statutes, 5th series, c. 3, which not only purports to take away the right of action against members, which it may be is legislation with regard to civil rights, but purports to alter the criminal law by giving the members immunity from prosecution. In fact, it makes any such action or prosecution a violation of the chapter, and, therefore, under s. 31 punishable as a crime. Such an interference with the liberty of the subject far transcends any powers possessed by the Imperial House of Commons, is in the highest degree tyrannical, and cannot be within the powers of the provincial legislature. If the appellants' contentions are correct, the provincial legislatures have far wider powers than those possessed by the Dominion Parliament, which by 38 & 39 Vict. c. 38, repealing s. 18 of the British North America Act, are limited to those possessed by the Imperial House of Commons at the time of the passing of any Dominion Act taking such powers.

Counsel for appellants were not heard in reply.

1896 *July* 28.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from an order of the Supreme Court of Nova Scotia dismissing the application of the appellants for an order that the verdict and judgment entered for the present respondent at the trial of the action before Townshend J. might be set aside and judgment should be entered for the appellants. By the verdict and judgment in question the appellants were found to have unlawfully assaulted and imprisoned the respondent. The Supreme Court were equally divided. McDonald C.J. and Graham E.J. were in favour of confirming the judgment, whilst Ritchie J. and Weatherbe J. held that judgment should be entered for the appellants. The judgment of Townshend J. therefore stood confirmed.

The respondent was summoned to attend at the Bar of the

House of Assembly to answer a breach of the privileges of the House in having published a libel reflecting on a member or members of the House (in connection with their conduct as members of the House). He attended on two occasions, and on the second occasion was ordered to withdraw and remain in attendance during the debate which took place. On being called in by the serjeant-at-arms by order of the speaker he refused to obey the order and left the precincts of the House.

It is not denied that the respondent intentionally disobeyed the order of the House. He was thereupon arrested by order of the House, and on being brought to the Bar was adjudged to have been guilty of a contempt of the House committed in the face of the House, and was committed to the common gaol of Halifax for forty-eight hours. Upon this he brought an action for assault and imprisonment, and it is from the judgment in that action that the present appeal is brought. The appellants are sought to be made liable by reason of their having voted as members of the House of Assembly for the imprisonment of the respondent.

The acts complained of were justified under ss. 20, 29, 30, 31 of c. 3 of the Revised Statutes of Nova Scotia, 5th series. The appellants also relied on the indemnity given to members of the House of Assembly by s. 26 of the same statute.

These sections are as follows:—

"20. In all matters and cases not specially provided for by this chapter, or by any other statute of this province, the legislative council of this province and the committees and members thereof respectively, shall at any time hold, enjoy and exercise such and the like privileges, immunities and powers as shall be for the time being held, enjoyed and exercised by the senate of the Dominion of Canada, and by the respective committees and members thereof, and the House of Assembly, and the committees and members thereof, respectively, shall, at any time, hold, enjoy and exercise such and the like privileges, immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada, and by the respective committees and members thereof; and such privileges, immunities and powers, of both Houses, shall be deemed to be

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and shall be part of the general and public law of Nova Scotia, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this province, and by and before all justices and others, be taken notice of judicially."

"26. No member of either House shall be liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before such House; and the bringing of any such action or prosecution, the causing or effecting any such arrest or imprisonment and the awarding of any such damages, shall be deemed violations of this chapter."

"29. The following acts, matters and things are prohibited, and shall be deemed infringements of this chapter:—

"1. Insults to or assaults or libels upon members of either House during the session of the legislature."

The other provisions of the section are immaterial to the present purpose.

"30. Each House shall be a Court of Record, and shall have all the rights and privileges of a Court of Record for the purpose of summarily inquiring into and (after the lapse of twenty-four hours) punishing the acts, matters and things herein declared to be violations or infringements of this chapter; and for the purposes of this chapter each House is hereby declared to possess all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission or doing of any such acts, matters or things, and awarding and carrying into execution the punishment thereof provided for by this chapter, and amongst other things each House shall have power to make such rules as may be deemed necessary or proper for its procedure as such court as aforesaid.

"31. Every person who shall be guilty of an infringement or violation of this chapter shall be liable therefor (in addition to any other penalty or punishment to which he may by law be subject) to an imprisonment for such time during the session of the legislature then being held, as may be determined by the House before whom such infringement or violation shall be inquired into. The nature of the offence shall be succinctly

and clearly stated and set forth on the face of any warrant issued for a commitment under this section."

It should be mentioned that by an Act (Revised Statutes of Canada, 49 Vict. c. 11) the Dominion Parliament had already conferred on themselves the privileges, immunities, and powers of the House of Commons of the United Kingdom.

If it was within the powers of the Nova Scotia Legislature to enact the provisions contained in s. 20, and the privileges of the Nova Scotia Legislature are the same as those of the House of Commons of the United Kingdom as they existed at the date of the passing of the British North America Act, 1867, there can be no doubt that the House of Assembly had complete power to adjudicate that the respondent had been guilty of a breach of privilege and contempt and to punish that breach by imprisonment. The contempt complained of was a wilful disobedience to a lawful order of the House to attend.

The authorities summed up in *Burdett* v. *Abbot* (1), and followed in the case of *The Sheriff of Middlesex* (2), establish beyond all possibility of controversy the right of the House of Commons of the United Kingdom to protect itself against insult and violence by its own process without appealing to the ordinary courts of law and without having its process interfered with by those courts.

The respondent, however, argues that the Act of the provincial legislature which undoubtedly creates the jurisdiction and further indemnified members of it against any proceedings for their conduct or votes in the House by the ordinary courts of law is ultra vires.

According to the decisions which have been given by this Board there is no doubt that the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom, or the power to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the Imperial Legislature. By s. 1 of 38 & 39 Vict. c. 38, which was substituted for s. 18 of the British North America Act, 1867, it was enacted that the privileges, immunities and powers to be held, enjoyed and

(1) 14 East, 1.

(2) 11 Ad. & E. 273.

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exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities or powers should not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia, and it was argued, therefore, that it was not the intention of the Imperial Parliament to confer such a power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created which was not necessary in the case of the existing Legislature of Nova Scotia. By s. 88 the constitution of the Legislature of the Province of Nova Scotia was subject to the provisions of the Act to continue as it existed at the union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose.

Their Lordships are, however, of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s. 92 of that Act the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects enumerated (inter alia), the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant-Governor.

It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the dis-

charge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.

It is further argued that the order which the respondent disobeyed was not a lawful order, or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the orders of the House, yet as those orders were issued in reference to a certain petition presented to the House the contents of which were alleged to be libellous and during the investigation of the question who was responsible for its presentation, and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to be inquired into, inasmuch as libel is a criminal offence and the criminal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was ultra vires, and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law.

Their Lordships are unable to acquiesce in any such contention. It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament; but that does not prevent an inquiry into and the punishment of an interference with the powers conferred upon the provincial legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence, or brings the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of state government which is known as the criminal law.

The effort to drag such questions before the ordinary courts when assaults or libels have been in question in the British Houses of Legislature have been invariably unsuccessful, and

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it may be observed that 1 Wm. & M., Sess. II., c. 2, s. 1, sub-s. 9, "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament," is declaratory and not enacting.

Their Lordships are, therefore, of opinion that s. 20 of the Provincial Act is not ultra vires and affords a defence to the action. It may be that ss. 30, 31 of the Provincial Act if construed literally and apart from their context would be ultra vires. Their Lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in the light of the other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, s. 30 could not be supported.

It is to be observed that in the case of *Barton* v. *Taylor* (1), referred to by one of the learned judges below, is no authority in favour of the contention here. No statute was there relied upon, but the Legislative Assembly itself in that case had in pursuance of statutory powers adopted certain standing rules or orders for the orderly conduct of the business of the assembly. The trespasses complained of were adjudged by this Board not to be justifiable under the standing orders. It was then sought to justify the acts in question as being within a power incident to or inherent in a Colonial Legislative Assembly. This Board refused to adopt that contention, but their Lordships expressly added:—

"They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly 'to adopt

(1) 11 App. Cas. 197.

from the Imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any longer period than the sitting during which the obstruction occurred.' This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it."

But independently of these considerations the provisions of s. 26 of the Act of the provincial legislature would in their Lordships' opinion form a complete answer to the action even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action, and they think it sufficient to say that the legislature could relieve members of the House from civil liability for acts done and words spoken in the House whether they could or could not do so from liability to a criminal prosecution.

No such question as that which arose in *Barton* v. *Taylor* (1) arises here. All these matters—the express enactment of the privileges of the House of Commons of the United Kingdom—the express power to deal with such acts by the Provincial Assembly—the express indemnity against any action at law for things done in the Provincial Parliament, are all explicitly given, and the only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the provincial legislature to make such laws.

For these reasons their Lordships will humbly recommend

(1) 11 App. Cas. 197.

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to Her Majesty that the judgment in this case should be reversed and judgment entered for the appellants here [the defendants below] with costs. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Hill, Son & Rickards.*
Solicitors for respondent: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

J. C.* 1895 *Nov.* 15. 1896 *June* 9; *July* 28.

SMITH (OFFICIAL LIQUIDATOR OF THE BONANG GOLD MINING COMPANY, LIMITED) . . . } APPELLANT;

AND

BROWN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Companies Act, 1874, *s.* 57—*English Companies Act*, 1867, *s.* 25—*Contract—Shares deemed to be fully paid up—Liability.*

Where the members of a syndicate resolved to form a company, distributing the shares therein rateably amongst themselves according to the extent of their interests in the syndicate property, the same to be deemed in great part paid up, and a deed of sale of their property was executed by their trustees to a trustee for the company, afterwards filed with the registrar and adopted by the directors, which embodied the above resolution:—

Held, that the deed of sale was not a contract within the meaning of s. 57 of the Colonial Act of 1874, corresponding with s. 25 of the English Companies Act of 1867, so as to protect the shares from liability to calls in respect of the amounts which were to be deemed as paid up. It did not effect a genuine transfer of property in respect of which shares deemed to be paid up formed part of the consideration; nor were any legal rights or liabilities created thereby.

Hartley's Case (L. R. 10 Ch. 157) distinguished.

APPEAL by special leave from an order of the Supreme Court (Nov. 13, 1893) affirming an order of Manning J. (Aug. 25, 1893), which dismissed an application by the appellant that the

* *Present:* THE LORD CHANCELLOR, LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

respondent should be settled on the list of contributories in respect of 366 shares in the Bonang Gold Mining Company, Limited.

The company was constituted under the New South Wales Companies Act, 1874, which is based upon, and is in many respects identical with, the English Companies Acts, 1862–1867; s. 57 corresponding with s. 25 of the English Act of 1867.

In liquidation the appellant, under the circumstances stated in their Lordships' judgment, placed the respondent on the list of contributories in respect of 2032 shares of which he was the registered holder, having paid only 3*s.* in cash in respect of their nominal value of 20*s.* each. The appellant credited him with a further sum of 3*s.* as an equitable allowance for the true value of the property taken over and worked by the company, and claimed that there was a further liability on the shares to the extent of 14*s.* each.

The respondent claimed that the shares should be deemed to have been fully paid up in respect of the 17*s.*, over and above the 3*s.* paid in cash, by virtue of a contract dated July 30, 1888, which it was contended was within the meaning of s. 57 of the Colonial Act.

The master excluded the whole 2032 shares from the list on the ground that the shares had been issued in pursuance of the contract of July 30.

Manning J. ordered that the respondent should be retained on the list in respect of 1666 shares, and excluded in respect of 366 shares. He held that the contract was within s. 57, but that the respondent, having subscribed the memorandum of association in respect of 1666 shares, must be held to have taken them on the registration of the company, which was the day before the contract of July 30 was filed. As regards the 366 shares, they had been issued after the filing of the contract.

The respondent did not appeal as regards the 1666 shares, and the Full Court dismissed the appellant's appeal as regards the 366 shares.

That appeal was on the grounds—(1.) that the company was not a party to the contract; (2.) that a company cannot ratify a contract entered into on its behalf before incorporation; (3.)

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that there was no formal act on the part of the company so as to make the contract the contract of the company. The reasons of the Full Court were as follows:—

"It is impossible to distinguish this case from *Hartley's*. (1)

"That was a decision of the Court of Appeal in England presided over by Lord Cairns, one of the most eminent Lord Chancellors of England, who was not likely to use loose or ill-considered language in delivering the judgment of the Court. It is said that that case is in conflict with subsequent authorities, and it may be that, as Manning J. has put it, the case is in conflict with the reasoning which has guided later decisions; but on looking at the cases referred to by Manning J., it is clear that they are not themselves in conflict, as the facts are entirely different from the facts in *Hartley's Case*. (1) In those later cases there was no contract of any kind: either it was executed in escrow, as was the case in *Dalton Time Lock Co.* v. *Dalton* (2), or the document purporting to be a contract was executed by a non-existent body, as *In re Anglo-Colonial Syndicate Limited*. (3) Here there is an actual valid contract made by a person who was a trustee holding property for the proposed company. Lord Cairns in *Hartley's Case* (1) points out that the section does not require the contract to be executed by the company so long as there is a valid contract registered which is enforceable against someone. I have said that the reasons given in support of the later decisions may be in conflict with the decision given in *Hartley's Case* (1); but of this I am by no means sure, seeing that the facts are so different.

"Assuming that they are in conflict, this Court, sitting as a Court of first instance so far as the Privy Council is concerned, cannot take on itself to overrule a decision of the Court of Appeal in England unless it sees that there is another decision of the Court of Appeal directly in conflict. Under such circumstances we might be driven to say which decision was in our opinion correct. If the decision in *Hartley's Case* (1) is not correct it must be rectified by the Privy Council; but I very much doubt whether in view of the fact that that case has

(1) L. R. 10 Ch. 157. (2) 66 L. T. 704.
(3) 65 L. T. 847.

remained in the books unreversed for eighteen years the Privy Council itself would think fit to interfere, even on the assumption that if the facts came before them for the first time free from the decision in that case they might decide the point in the opposite way.

"Considering the number of companies both in England and this Colony that not improbably have been guided by the decision in *Hartley's Case* (1), believing it to be a correct exposition of the law, inasmuch as it has never been expressly dissented from or overruled, incalculable damage might be done if the course suggested were adopted. In following *Hartley's Case* (1) we are at any rate on the safe side. The appeal will therefore be dismissed."

The hearing of the appeal by their Lordships was begun on November 15, but was adjourned for a fuller attendance of the Committee.

Bray and *Malcolm Macnaghten*, for the appellant, contended that the deed of sale of July 30, 1888, filed with the registrar was not a contract within the meaning of s. 57 of the Colonial Companies Act, 1874. When fully examined in relation to all the surrounding circumstances, it is not a contract at all. No one was bound by it, nor was it enforceable against any body. The company was not a party to it, was not bound by it at the time of registration, or at any subsequent date. The allottees of the shares were not parties to it, never signed it, and did not come thereby under any obligation to take shares. As a matter of fact the allottees accepted the shares, but it was optional with them to refuse them, and they did not accept on terms of any binding contract to that effect within the meaning of s. 57, but merely in pursuance of an antecedent arrangement inter se and for their own convenience. The deed in effect embodied a mere resolution by certain parties interested in land that they would continue to hold it in a different manner as a company, and not as a syndicate; but there was no contract creating rights and imposing liabilities in pursuance of which

(1) L. R. 10 Ch. 157.

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and by force of s. 57 the allottees of the shares in the company so formed were legally discharged of their liability to pay up the amount thereof. Reference was made to *Kelner* v. *Baxter* (1); *Touche* v. *Metropolitan Ry. Warehousing Co.* (2); *Melhado* v. *Porto Alegre Ry. Co.* (3); *Spiller* v. *Paris Skating Rink Co.* (4); *In re Empress Engineering Co.* (5); *In re Northumberland Avenue Hotel Co.* (6); *In re South Wales Atlantic Steamship Co.* (7); *Ex parte Menzies* (8); *Dalton Time Lock Co.* v. *Dalton* (9); *Firmstone's Case* (10); *Elsner and McArthur's Case.* (11)

The respondent did not appear.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appeal in this case raises a question of a class which frequently arises in the winding-up of joint stock companies—namely, the question whether a registered shareholder is entitled to escape contribution on the ground that the calls on his shares are to be taken as having been paid up wholly or partially.

At the date of the winding-up the respondent was the registered holder of 2032 1*l.* shares. He contended that they were fully paid up—3*s.* by actual payments, and the balance of 17*s.* by contract. As to 1666 shares his claim has been rejected, and so far there is no further contest. As to the remaining 366 shares his claim has been sustained, and the official liquidator appeals from that decision. A number of other shareholders are in the same position, and their interests are affected by this appeal; but, unfortunately, no one appears to oppose it.

The company was formed under the Companies Act, 1874, the 57th section of which is to the same purport with s. 25 of the English Act of 1867. Every share is to be taken as subject to the payment of its whole amount in cash, unless otherwise

(1) L. R. 2 C. P. 174.
(2) L. R. 6 Ch. 671.
(3) L. R. 9 C. P. 503.
(4) 7 Ch. D. 368.
(5) 16 Ch. D. 125.
(6) 33 Ch. D. 16.
(7) 2 Ch. D. 763.
(8) 43 Ch. D. 118.
(9) 66 L. T. (N.S.) 704.
(10) L. R. 20 Eq. 524.
(11) [1895] 2 Ch. 759.

determined by contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of the shares. It is the common case that the respondent has paid only 3*s.* on the shares which are of the nominal value of 1*l.*; and that the balance of 17*s.* was the subject of negotiations before the company was formed. The question between the respondent and the company is whether the 17*s.* are to be taken as paid up by virtue of (*a*) a contract in writing (*b*) filed with the registrar (*c*) before the issue of the shares.

On March 8, 1888, Messrs. Fletcher offered the property afterwards worked by the company to a syndicate of twenty persons, each contributing 500*l.* Upon this offer a syndicate was formed of more than twenty persons, some of whom took a fortieth share instead of a twentieth. They in effect purchased the property of Messrs. Fletcher for 10,000*l.*, and it has been duly paid for.

The next document is a deed by which four gentlemen, named Walford, Laidley, Dibbs, and Taylor, declared themselves trustees of the property in question for the syndicate, whose members were named in a schedule with the share of each opposite his name. The deed appears to have been executed by the four trustees in April, 1888, but it is not dated, and is not executed by any other members of the syndicate. Walford, Taylor, and Dibbs were themselves along with twenty others named in the schedule as members of the syndicate, and the shares ascribed to the twenty-three are thirty-nine fortieths of the whole.

On July 12, 1888, the syndicate met and resolved that a company should be formed with a capital divided into 100,000 shares, and the shares allotted pro ratâ among the syndicate and issued as paid up to 17*s.* per share. After this it seems that the syndicate acted as if a company had been formed; and among other acts they allotted shares, though no certificates were issued till the month of October.

On July 30 a deed was executed by Dibbs, Taylor, Walford, and Laidley (who are called the vendors), as trustees for the syndicate comprised of the persons named in the schedule thereto of the one part, and McKellar (who is called the trustee)

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of the other part. Thereby the vendors purport to agree with the trustee that a limited liability company shall be formed for working the mining property in question, which the vendors purport to sell and the trustee for the projected company purports to buy. The deed contained the following clauses:—

"3. That the capital of the said company shall be one hundred thousand pounds in one hundred thousand shares of one pound each, which shall be deemed to be and issued as paid up to seventeen shillings per share, and subject to a liability of three shillings per share and no more."

"5. That the consideration for the before-mentioned sale and for the transfer of the said property to the said company after formation shall be the issue of one hundred thousand shares paid up to the extent of seventeen shillings, and with a liability of three shillings per share, duly allotted to the persons named and in the numbers set out in the said schedule.

"6. The said trustee for and on behalf of the said proposed company agrees that the one hundred thousand shares in such company shall be issued to the subscribers therefor on the following terms: namely that the sum of seventeen shillings per share, which represents the sum at which the proprietors value the property to be transferred by the company, shall be deemed to have been paid on each share by such transfer, and that such shares shall have a liability thereon of three shillings per share and no more; and such three shillings may be called up by direction of the company from time to time as the money is required for developing the property.

"7. That within thirty days after the registration of the company this agreement shall be adopted by the board of directors of the said company by a resolution which shall be duly entered on the minutes of the proceedings of the said company.

"8. That the said trustee shall incur no personal liability whatever in respect of this agreement."

In the schedule, which contains the names of the syndicate and their shares in the concern, the respondent appears as the holder of 1666 shares. The syndicate now consisted of twenty-six persons, Laidley and two others having been added since

the deed of April. The whole 100,000 shares were distributed among them.

The memorandum of association is dated August 8. By the 5th and 6th clauses the terms, conditions, and objects of the agreement of July 30 are adopted. The memorandum is signed by nine shareholders, among whom is the respondent, signing for 1666 shares. On September 6 the memorandum and also the articles of association were filed with the registrar, and the company was then completely formed. On the next day the deed of July 30 was filed. On September 14 the directors passed a resolution adopting that agreement. This resolution has never been filed.

The master in equity held that the respondent ought to be excluded from the list of contributories. The official liquidator appealed, and the case was heard by Manning J. That learned judge held that the 1666 shares for which the respondent signed the memorandum of association were issued to him on September 6 when the memorandum was filed. Therefore they could not be protected by the agreement of July 30, which was not filed till September 7.

The remaining shares, held by the respondent, were issued later. As regards them, Manning J. states that his own opinion, apart from decided cases, would be that, in order to give protection under s. 57, there ought to be filed a formal document under the seal of the company, acknowledging itself bound by the agreement relied on. But then he thinks that the decision in *Hartley's Case* (1) compels him to hold that the agreement of July 30, which was registered before the issue of the 366 shares, is such an agreement as satisfies the 57th section. For this reason he made an order dated August 25, 1893, by which he varied the master's certificate to the extent of making the respondent a contributory for 1666 shares, with a liability to the extent of 14*s.* a share and to no further extent.

The respondent did not appeal from this order. The official liquidator appealed for the purpose of making the respondent a contributory for the other 366 shares. The Full Court, without going into the other arguments, expressed their con-

(1) L. R. 10 Ch. 157.

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currence in Manning J.'s view of the effect of *Hartley's Case* (1), and they dismissed the appeal.

Their Lordships have been furnished with a copy of the agreement in *Hartley's Case*. (1) It was made between a Mr. Boden of the one part, and a Mr. Field of the other part. Field is described as the agent of a company then being formed, and of the promoters thereof. Boden agrees to sell and Field to purchase certain property at the price of 6000*l*., to be paid as to 4800*l*. by an equivalent amount of fully paid-up shares in the intended company, and as to 1200*l*. in cash after the registration of the company. If the company should fail within thirty days of registration to adopt the agreement the vendor was to be at liberty to annul the sale. After the formation of the company, but before the registration of the agreement under the Act of 1867, 200 of the vendor's paid-up shares were issued to his assignee or nominee Hartley. After the issue, registration of the agreement, which had been previously overlooked, was effected. Then the 200 issued shares were cancelled and 240 new ones allotted to Hartley. Those proceedings gave rise to two questions. First, the official liquidator put Hartley on the list in respect of the 200 cancelled shares; and the question was whether the cancellation was valid. The Court held that it was, pointing out that 200 paid-up shares were part of the purchase-money, and that if they were not granted the vendor would to that extent be still unpaid. Owing to inadvertence, the 200 shares first issued were liable to calls, and in rectifying that mistake the company were only doing without suit what the Court would have ordered them to do.

Their Lordships notice these facts because in the authorized LAW REPORTS (2) the statement of the case is confined to the cancelled shares, and, except for one passage in Lord Cairns' judgment, there is nothing to shew that the sufficiency of the agreement was in controversy. But from other reports (3) it is clear that the official liquidator put Hartley on the list in respect of the 240 new shares as well as the 200 cancelled ones.

(1) L. R. 10 Ch. 157.
(2) L. R. 18 Eq. 542; 10 Ch. 157.
(3) 23 W. R. 203; 44 L. J. (Ch.) 240; 32 L. T. 106.

and that the sufficiency of the agreement came into question with respect to those shares, and was upheld in both Courts, and that Mellish L.J. expressed his concurrence with Lord Cairns.

In delivering his opinion Manning J. went into a careful and learned examination of the question whether other cases to which he referred can be reconciled with *Hartley's Case*. (1) The Full Court also addressed themselves to the same point. They said that the cases suggested as being in conflict with *Hartley's Case* (2) are not really so, because in them there was either no contract, or a document executed as an escrow, or one purporting to be executed by a non-existent body. Whereas here, the Court says, there is an actual valid contract made by a person who was a trustee holding property for the proposed company.

The only document purporting to be an agreement which has been registered in the present case, and the only document, therefore, which it is necessary to consider, is that of July 30, 1888. The Courts below regard it as a contract sufficient to comply with the exigencies of s. 57 of the Act of 1874.

In the opinion of their Lordships that document is not a contract in any proper sense of the word. It is nothing more than a resolution by certain persons interested in a mining property setting forth the manner in which they proposed to put the property before the public. It does not create nor was it intended to create any legal rights, duties, or obligations as between the persons expressed to be parties to it. It was a contract in form only. The persons interested in the property and the shareholders in the company to be registered were just the same persons over again in a different guise; they had, as stated above, already distributed the whole of the share capital among themselves. In *Hartley's Case* (2) there was a genuine sale and a genuine purchase and a genuine bargain to pay the price by paid-up shares issued to the vendor, who could enforce the bargain under peril of annulling the sale.

The result is that the respondent has not brought himself

(1) L. R. 18 Eq. 542; 10 Ch. 157. (2) L. R. 10 Ch. 157.

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within the protection given by s. 57; that the order of the Full Court dismissing the appeal to them should be discharged; and that Manning J.'s order of August 25, 1893, should be varied so as to include the respondent in the list of contributories for the whole number of shares for which he was placed there by the official liquidator. In other respects that order should be affirmed. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

The official liquidator does not ask for costs against the respondent, which their Lordships think to be a very reasonable course under the circumstances of the case. The appellant's costs will be answered by the estate that is being wound up along with the other costs of liquidation.

Solicitors for appellant: *Lumley & Lumley.*

[HOUSE OF LORDS.]

BARNES OR ROSS . . . . . APPELLANT;

AND

ROSS . . . . . RESPONDENT.

H. L. (Sc.)
1896
July 27.

Guardian and Ward—Maintenance and Establishment of Pupil Heir—Accounts.

Where the mother is the sole guardian of the heir to large estates the sum allowed the mother for the upkeep of establishment and education of the heir ought to be such sum as prudent guardians would allow to her "as mother." To decide what is a reasonable sum all the circumstances of each case must be considered; the governing consideration being what is for the interest of the heir.

Whether the guardian of a minor heir is a relative or not, strict yearly accounts of the administration of the minor's property ought to be kept.

APPEAL from interlocutors of the Court of Session, Scotland.

Sir Charles H. A. F. L. Ross, the respondent, on coming of age brought this action against his mother, the appellant, Lady Ross, the widow of the late Sir Charles W. A. Ross, of Balnagown, Baronet, for an account of her management of the respondent's entailed estates while he was a minor. (1)

Various questions arose in the Court of Session; but the following were the questions in the appeal: First, as to the amount of allowance which ought to be allowed to the appellant in her accounts for the upkeep of establishments and maintenance of the son. The First Division sanctioned a charge of 2000*l.* for the first three years, 2500*l.* for the next five, and 2000*l.* for the last two years of minority. The appellant asked for 4000*l.* a year over the whole period. The second point was whether an allowance to the extent of 10 per

(1) The appellant's general account was as follows:—

"State of the accounts of Lady Ross in connection with the estates of her husband the late Sir Charles W. A. Ross of Balnagown, Bart., from 26th July, 1883 (the date of the late Sir Charles' death), to 4th April, 1893 (when the present Sir Charles attained majority).

"*Note.*—Lady Ross was executrix for her husband, and tutor for her son. The whole moveable estate was conveyed to her along with certain

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cent. on the value of furniture belonging to the appellant in Balnagown Castle should be allowed. The Court disallowed

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annuities from the entailed estates, and the liferent of fee-simple estate. The accounts of the fee-simple estate have been kept separate, and are not dealt with here.

"*Receipts.*

Amount of rents, woods and estate produce received, per Appendix No. I., page 4		£158,666 0 9

"*Payments.*

1. Public burdens, repairs, interest of heritable debt, rent charges, management and miscellaneous estate payments, also upkeep of establishments and heir's maintenance, per Appendix No. II., p. 4	£129,344 2 10	
2. Jointure to Lady Lockhart Ross, under marriage contract and bonds of annuity, to Martinmas 1892, per Appendix No. III., p. 5	18,605 9 7	
3. Sums payable in respect of Forest Farm sheep stock, including sum borrowed from Lady Ross, and interest, in terms of Mr. Howden's Report for year 1884, per Appendix No. IV., p. 5	3,513 11 3	
4. Rent of furniture in Balnagown Castle, Bonnington House, and shooting-lodges, belonging to Lady Lockhart Ross, per Appendix No. V., p. 6 ..	5,212 17 6	
5. Interest on sums due to Lady Lockhart Ross for period of accounts, per Appendix No. VI., p. 6	2,698 11 10	
6. Balance in factor's hands at 4th April, 1893, to which Lady Ross is entitled	7 10 0	
		159,382 3 0
Balance due by the heir to Lady Lockhart Ross ..		£716 2 3

Appendix No. I. gave the receipts from rents, woods and estate produce, from 26th July, 1883, to 4th April, 1893, as 158,666*l.* 0*s.* 9*d.*

Appendix No. II. gave payments for public burdens, repairs, interest of heritable debt, &c., &c., upkeep of establishments and heir's maintenance (calculated at 4000*l.*) from 26th July, 1883, to 4th April, 1893, as 129,344*l.* 2*s.* 10*d.*

"*Note.*—In regard to the statement of the round sum of 4000*l.* per annum in respect of cost of upkeep of esta-

this on the ground that it was her residence as well as the respondent's. Thirdly, there was a point as to allowing the

blishments, and maintenance and education of the minor heir, it is stated that the curator did not consider it necessary, as between herself and her son, to keep regular accounts and vouchers of expenditure on the above heads, and that in point of fact, beyond some incomplete jottings or memoranda, she has no accounts, and beyond her cheques she has no vouchers of her expenditure on these heads. It might be possible, at the cost of much time and labour, to collect some material from which to create an account more or less complete of her expenditure on these heads. But she herself is quite satisfied—and she believes that her son must be satisfied also from his own knowledge—that the sum actually spent by her on his account, and to a great extent at his own request, upon these heads has been considerably in excess of the round sum here stated, and for the present she is content to state that sum as covering the expenditure, reserving her right to restate this branch of the account upon such materials as she may be able to recover hereafter should that be found necessary."

This was refused, and in answer to No. 1 of the respondent's objections, given below, the appellant made out an account which went beyond 4000*l.* per annum; and she alleged her actual expenditure on the heads of upkeep of establishments and heir's maintenance was between 5000*l.* and 6000*l.*

The following were the material objections of the respondent to the appellant's accounts:—

"1. The accounts lodged by the defender are not fully vouched. In particular, no vouchers have been produced to instruct the sum of 4000*l.* per annum, for which the defender takes credit for the upkeep of establishments and heir's maintenance, in Appendix No. II. of defender's account. The pursuer is willing, however, under reservation of his right to demand a detailed and fully vouched account, to allow the defender to take credit for the sum of 19,220*l.* 11*s.*, being the amount of an allowance, calculated at the rate of 2000*l.* per annum, from 26th July, 1883, to 4th April, 1893, as shewn in Appendix I. hereto, and he objects to any larger sum than that being charged, whatever vouchers may be produced.

"2. The pursuer submits that income tax falls to be deducted from the sums due to the defender under her marriage contract and the bonds of annuity in her favour, and that the sum of 18,105*l.* 7*s.* 4*d.* only should be debited to him under this heading, as shewn in Appendix II. hereto.

"3. The pursuer objects to the charge made for interest on furniture, and submits that the defender is only entitled to 5 per cent. on the value of the furniture in Bonnington House and the shooting-lodges, as shewn in Appendix III. hereto, and to no interest on the furniture in Balnagown Castle, she having occupied the castle herself."

"6. The pursuer objects to the whole claim embodied in Appendix No. IV. of defender's account. The stock was kept on Forest Farm, and the farm was managed by defender for her own benefit from the date of the late Sir Charles Ross's death, and the stock was never taken over by pursuer. The pursuer has therefore no concern with any alleged depreciation in value

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rent of Scotsburn shooting, kept for the respondent at his request during the last two years of his minority. The further question in the appeal was for a sum of about 1500*l.*, made up of two sums, one of 500*l.* and the other of 900*l.* odd. The 500*l.* was said to be due to the appellant as executrix, being the balance of receipts from the Forest Farm not paid at the death of the late Sir Charles. The 900*l.* was incurred on the same farm during the year after the late Baronet's death. As to these sums, it was said that the appellant was left by the late Sir Charles the large sheep flock on the farm, and these expenses were incurred with respect to those sheep. The appellant contended they had nothing to do with the sheep; that the farm had to be kept in repair while unlet.

The late Baronet, Sir Charles W. A. Ross, of Balnagown, died on July 26, 1883. His wife, the appellant, and one child of the marriage, the respondent, who was born on April 4, 1872, survived him. He was, therefore, at his father's death a

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of the stock or any alleged loss in the working of the farm during the period between the date of the late Sir Charles Ross's death and Whitsunday, 1884. In the event of the defender being able to shew that no profit was made by her during said period the pursuer is willing to forego his claim for rent for said period.

"7. The following sums which fall to be credited to the pursuer have been omitted from the account:—

"(1.) The sum of 300*l.* per annum from Whitsunday, 1885, being the increased rent of Deanich shootings. The rearrangement of the boundaries of the Forest Farm and the Deanich shootings was carried out before the fixing of the rent of Forest Farm and Croick at 750*l.* per annum, so that the defender is not entitled to any deduction in respect of the portion of Forest Farm added to Deanich.

"(2.) Sums due by the defender on account of rents of farms which were occupied by her, per Appendix No. X. hereto. While the pursuer does not admit that the defender was tenant of these farms, he is entitled to the rents fixed by herself on entry, for the period down to 4th April, 1893. The pursuer reserves all further claims competent to him against the defender in respect of said farms.

"(3.) A sum of 429*l.* 3*s.* 5*d.*, being the price of a piece of land taken from the entailed estate by the Highland Railway Company as fixed by decree-arbitral, dated 2nd September, 1886, which sum was uplifted by the defender on 24th October, 1887."

"9. The pursuer has made up a statement giving effect to the objections above set forth, and submits, under the reservations before referred to, that said statement now produced, being Appendix No. XII. hereto, should be approved of, and decree for 42,721*l.* 19*s.* granted in his favour."

little over eleven years of age. From the death of his father until the respondent attained majority on April 4, 1893, the appellant, his mother, acted as his sole tutor and curator, or guardian; and managed his whole estates. The late Sir Charles left real estate in Sutherlandshire, Ross-shire, and Lanarkshire, and personalty. The Balnagown estates in Sutherlandshire, the estate of Bonnington in Lanarkshire, and the great bulk of the estates in Ross-shire, were entailed. The gross rental from the entailed estates appeared to be about 14,000*l.* in 1883; and it was alleged that under the appellant's careful management the gross rental and receipts rose to 19,000*l.* in 1893. This rental was burdened with a jointure of 2000*l.* a year to the appellant, and annual outgoing —public taxes, interest on debt, and repairs—which amounted on an average to a sum of 9000*l.*, leaving in 1883 a clear income of 3000*l.*, rising to 8000*l.* in 1893, or an average of 5500*l.* over the whole period.

The unentailed estates of Balnagown were by the late Sir Charles W. A. Ross's settlement left to the respondent, but subject to the liferent of the appellant. The value of this life interest to the appellant was under 1000*l.* a year; the total income coming to the appellant was about 3500*l.*

Sir Charles also left personalty amounting to about 32,000*l.*, which he left absolutely to the appellant. It consisted of 16,300*l.* in sheep stocking Forest Farm, situated on the entailed estate of Balnagown. Amongst other personalty was the furniture in the various houses and shooting-lodges on the entailed estates valued at 5300*l.*

The respondent raised other actions against the appellant as well as this immediately on coming of age; he also married a few days after he came of age. Amongst the other actions was one for legitim; and succeeding, the Court gave him half the above-mentioned sum of 32,000*l.* That decree gave him a claim to half the personalty left by the deceased, which with interest came to about 24,000*l.* The appellant then claimed that the respondent should bring in the value of his interest in the unentailed estates, or that these estates should be declared to belong to her in fee simple; and she got decree accordingly.

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The respondent also refused to pay the appellant's jointure, and she got a decree for that amounting to a sum of about 5000*l.* It was also alleged she could not let the farms except at a greatly reduced rent or for other causes: these farms she took over as tenant, allowing herself abatements in the rents. The respondent brought an action to eject the appellant from these farms; and the Court have given him decree. Several questions were raised in this action regarding these farms, and particularly as to the abatements; these questions were decided adversely to the appellant, and she gave them up. The result roughly comes to be that the respondent obtained decrees against his mother, the appellant, for about 50,000*l.*, and she has got decrees for 20,000*l.*; so there was due from her 30,000*l.* or so.

Balnagown Castle and its appurtenances are on a very extensive scale. The gardens and policies alone cover about eight acres; there are also expensive glass-houses and a large game establishment. All had to be maintained whether the castle was occupied or not, otherwise serious loss and damage to the estate would have resulted. To properly keep up Balnagown Castle and grounds necessitated the employment of a large staff. The appellant alleged that this could not be done under 3000*l.* a year; that her late husband, Sir Charles, paid more even before his marriage; and that she considered it expedient and in the heir's interest to keep Balnagown open as his home.

The Forest Farm was a large farm of 60,000 acres; the sheep stock belonged to the appellant. This farm could not be let the year after the late Sir Charles's death; the appellant therefore became tenant, and the charge of 1500*l.* as given above was made by her.

Scotsburn shooting was situated to the extent of two-thirds of its area on the unentailed estate of Balnagown, and one-third on the entailed estate. Of the rent, 100*l.* a year was to be credited to the entailed estates, and 200*l.* to the unentailed estates. The appellant kept it specially unlet during the years 1889 to 1892 for the respondent's shooting and at his special request. She credited him with 100*l.* a year rent, but nothing

was paid; and she claimed to be allowed the full rent for these years.

Although regular accounts were kept in the estate office of the income and expenditure of the entailed estates of Balnagown and Bonnington, no proper accounts were kept of expenditure on the establishment or personal expenses of the respondent. These expenses were defrayed out of a special banking account called the household account. The appellant began by resolving to make 1500*l.* a year suffice for this purpose; then she fixed 2000*l.*; but before long she increased this to 3000*l.*

The Lord Ordinary found that on an average of years the appellant spent about 5000*l.* a year on the upkeep of establishments and maintenance of heir, not taking into account the appellant's personal expenses.

She was warned by Mr. Pitman, a law agent in Scotland, that it was her duty as guardian to keep strict accounts, but she did not keep them.

The household account was kept balanced by paying into it 3000*l.* a year from the entailed estate bank account, and as much again from the appellant's private account.

The expenditure for the respondent's maintenance, personal expenditure, school (Eton) and college fees and travelling expenses, averaged 1250*l.* This average included part of 2205*l.* paid into the respondent's private banking account in the last years of his minority, and part of 800*l.* paid for guns, boats, &c. Besides ordinary expenditure involved in the respondent's education, the appellant alleged that she incurred heavy expenses in travelling with him for his health. He was taken to Egypt, his mother accompanying him, and also to the Continent. She also took a house at Eton to be near him. She herself acted as factor on the estate from 1891, and thus saved him money. There being no regular maintenance accounts great expense had to be incurred in making up the accounts for this action. The contention of the appellant was that Balnagown and the heir's expenses and education amounted fully to 5000*l.* or 6000*l.* per annum; but she only asked 4000*l.*, including in this average figure, the 2205*l.* paid into his bank, and the 800*l.* for guns and

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boats. Then the Court allowed her interest on 1610*l.*, the value of the furniture at Bonnington and in the shooting-lodges; but she claimed also interest on 3750*l.*, the value of the furniture in Balnagown. Other claims were, 1500*l.* due for Forest Farm, and the rent of Scotsburn.

The following interlocutor, dated April 22, 1895, was pronounced by the Lord Ordinary (Stormonth Darling):—"The Lord Ordinary finds with reference to art. 1 (1) of the pursuer's objections to the defender's account, that the defender is entitled to take credit in her said account for sums in name of upkeep of establishment and maintenance of heir at the rate of 2000*l.* a year from July 26, 1883, to July 26, 1886, and 2500*l.* a year from the last-mentioned date till April 4, 1893, and also as separate items of charge against the pursuer for sums amounting to 2205*l.* which were placed to his credit after he went to Cambridge, and for the actual payments made by the defender in respect of guns and boats for the pursuer's use: with reference to art. 2 of said objections, finds that income tax falls to be deducted from the sums due to the defender under her marriage contract, and the bonds of annuity in her favour: with reference to art. 3 of said objections, finds that the defender is entitled to take credit for interest on the appraised value of the furniture in Bonnington House, and the shooting-lodges, as brought out in Appendix III. to said objections, but substituting the rate of 10 per cent. for the rate of 5 per cent. therein proposed, and that the defender is not entitled to take credit for any interest on the furniture in Balnagown Castle: with reference to art. 4 of said objections, finds that the pursuer has failed to prove that any of the items therein mentioned are improper charges against him, except the item of 73*l.* 13*s.* 3*d.*, which the defender admits must be struck out of the account: with reference to art. 5 of said objections, finds that the said article is not now insisted in by the pursuer: with reference to art. 6 of said objections, finds that the defender is not entitled to take credit for any of the items therein referred to: with reference to art. 7 of said objections, finds that the defender was not entitled to apply to her own use more than one-half of

(1) See note, p. 627.

the increased rent of 300*l.* a year paid for Deanich shootings, and was bound to pay the full rent at which she took over the various farms on the entailed estate of which she became tenant, without abatement, except to the extent of 50*l.* a year from and after July 26, 1888, in respect of the rabbit warren taken off the farm of Balnagown Mains, and therefore (*a*) that the sum of 150*l.* a year from and after Whitsunday, 1885, and (*b*) the sums set out in Appendix X. to said objections, less 50*l.* a year from and after July 26, 1888, ought to be credited to the pursuer: finds also (*c*) that the defender admits that the sum of 429*l.* 3*s.* 5*d.*, in respect of land taken by the Highland Railway Company, ought to be credited to the pursuer: with reference to the further item of rent for Scotsburn shootings, finds that the defender is not entitled to charge against the pursuer any rent in respect thereof; and, subject to these findings, appoints the cause to be enrolled, in order that the total sum due by the defender to the pursuer, including interest, may be ascertained."

The parties having lodged a statement giving effect to the above findings, the Lord Ordinary pronounced the interlocutor of November 13, 1895, in which he found "That the defender falls to be debited with interest at the rate of 3 per cent. with annual rests, and the defender having lodged in process a state shewing the total sums due to the pursuer, in terms of the Lord Ordinary's interlocutor of April 22, 1895, including interest at the said rate: approves of the said state, No. 2450 of process: decerns against the defender for payment to the pursuer of the sum of 28,903*l.* 4*s.* 11*d.* sterling, being the amount brought out in said state, with interest thereon at the rate of 5 per cent. per annum from the date of citation till payment: finds the pursuer entitled to expenses: allows an account thereof to be given in, and remits the same to the auditor to tax and report."

The appellant appealed to the First Division against the above interlocutors, and their Lordships, on February 25, 1896, pronounced the following interlocutor:—

"Recal the findings in said interlocutor of April 22, 1895, with reference to art. 1 of the pursuer's objections to the defender's account, and also recal the findings in said interlocutor with

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reference to art. 7 of said objections so far as regards the rent for Deanich shootings: find with reference to art. 1 of the pursuer's said objections to the defender's account that the defender is entitled to take credit in her said account for sums in name of upkeep of establishment and maintenance of heir at the rate of 2000*l.* a year, from July 26, 1883 to July 26, 1886, and 2500*l.* a year from the last-mentioned date to July 26, 1891; and 2000*l.* a year from the last-mentioned date to April 4, 1893: and with reference to art. 7 of said objections find that the defender was entitled to apply the increased rent of 300*l.* a year paid for Deanich shootings to her own use to the extent of 200*l.* a year, and therefore that the balance of said rent, being the sum of 100*l.* a year from and after Whitsunday, 1885, ought to be credited to the pursuer: Quoad ultra Adhere to the findings in said interlocutor: recal also the interlocutor of November 13, 1895, in so far as the same approves of the state No. 2450 of process, and also in so far as the same decerns against the defender for payment to the pursuer of the sum of 28,903*l.* 4*s.* 11*d.* sterling, with interest thereon, find that the sum due by the defender to the pursuer in terms of the findings in said interlocutor of April 22, 1895, as altered by this interlocutor is 29,321*l.* 11*s.* 9*d.* sterling, therefore decern against the defender for payment to the pursuer of the said sum of 29,321*l.* 11*s.* 9*d.* sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation till payment: Quoad ultra Adhere to the said interlocutor of November 13, 1895: find the pursuer entitled to additional expenses since November 13, 1895."

July 20, 21, 23. *Haldane, Q.C.*, and *J. A. Clyde* (of the Scottish Bar), for the appellant. The decree against the appellant stands in this action for about 29,000*l.* On coming of age various actions were commenced by the respondent. There is no doubt if the mother could have foreseen what was to happen she would have kept fuller accounts; but the accounts now furnished are not questioned. The appellant was a most energetic and vigilant lady, and had the interest of her son solely at heart. Under her care the estates have improved in

value, and when they were delivered over the heir was free from debt. The question is, in the circumstances of the case, what was for the best interest of the heir. Letters from his Eton tutor shew that he was a self-willed boy. The appellant supplied him with everything he wanted, her aim being to prevent him running into debt. She considered it her duty to take a house at Eton. The Scotsburn shooting was kept unlet for his enjoyment, and at his special request—he being used to handling a gun from his earliest years.

[LORD HERSCHELL. Dealing with one who can borrow, and is determined to have his whim, it may be better to let him have it, and pay for it out of the entailed estates, rather than that he should have recourse to those persons who may ruin him for life.]

No tenants could be found for many of the farms; she took them over as tenant herself. The Court, whether right or not, has decided that she was not entitled to the abatement she allowed herself, which would have had to be allowed to stranger tenants. Since 1891 she has acted as factor to the estates, and has thus saved the respondent 300*l.* a year. Balnagown Castle and grounds are very extensive. The appellant considered that Balnagown ought to be kept up for the interest of the heir, and as his home. It has been found by the Court of Session that she spent between 5000*l.* and 6000*l.* a year; her income averaged 3500*l.*, his 5500*l.*; even taking Balnagown as the joint home, the respondent's proportion of maintenance outlay ought to be 4000*l.*

[LORD WATSON mentioned Erskine, I., 7, 24.]

The appellant does not ask for each item of expenditure, but that the House should fix a round sum. Besides the allowance, she ought to have the interest on the value of the furniture at Balnagown for the use of it. Then 900*l.* odd was not too much to pay for the repairs and upkeep of the Forest Farm of 60,000 acres.

[LORD HERSCHELL. The House is agreed, that cannot be allowed. A year's rent was lost, and the sheep stock were the appellant's.]

Objection is made to the travelling expenses. But it was

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proper for the mother, as guardian of her only son, to go with him to Egypt when he was in bad health; also to live near him while at Eton. Certainly the amounts paid into his private banking account while at Cambridge, and the sum the appellant paid for his guns and boats, should be allowed.

A. Graham Murray, L.A., Q.C., and *Dickson, Q.C., Solicitor-General for Scotland* (with them *James J. Pitman*, of the Scottish Bar), for the respondent. The Court of Session has allowed quite enough in respect of the figures for maintenance, &c., and the decision ought not to be lightly departed from. As a measure of what the appellant should be allowed, see *Baird's Case*. (1) There the son was entitled to 15,000*l.* a year from land and to 1,000,000*l.* in personalty. The mother, who was not guardian, asked for 3500*l.*, and the Court gave her 3000*l.* The accounts here are correct, and it may be admitted that the appellant did spend more than the accounts contain; but it is perfectly certain they include the appellant's general expenditure. The travelling expenses are very large: take, for example, the whole party going to Egypt.

[LORD HALSBURY L.C. Take that as an example. Ought the mother not to have gone, the boy being, or appearing to her to be, in a bad state of health?]

The average free rental of his estates was 5406*l.*, and the appellant's account, No. I. for ten years, gives a balance against him of 716*l.* In spite of warning she did not keep accounts.

[LORD HALSBURY L.C. And she pays the penalty in this litigation.]

Is it not the same question now as if the appellant were applying to the Court for an allowance for maintenance?

[LORD HERSCHELL. I do not think so.]

It need not be argued that there ought to have been an accumulation by the time he came of age, but he was left without a single stick of furniture, and a balance brought against him. The result has been most unfortunate. If once there is a departure from keeping accounts, litigation must ensue. The amount of money at the respondent's disposal,

(1) 10 M. 482.

and the fact that he has been left without any ready money on coming of age, ought to be considered.

[They also cited Fraser's Parent and Child, p. 224.]

Haldane, Q.C., in reply.

LORD HALSBURY L.C. My Lords, the question with which your Lordships have to deal in this case does not admit of very precise treatment. How much money belonging to a ward may be spent upon his bringing up must in each case depend upon the circumstances of the case, and no rule applicable to every case can ever possibly be laid down so as to bring out a definite sum.

In the case now before your Lordships a mother was left sole guardian of her only child, who would be possessed of ample means upon his attaining his majority. In this action he now complains that too much has been spent by his mother during the period of the guardianship. It appears to me that, not only can no rule be laid down which will bring out a definite sum, but I think no sum in particular can be pointed out of which it can be affirmed absolutely that it was proper to spend it, though it is possible, in respect of some sums, to say that they were beyond the authority of the guardian. A broad view is all the case is susceptible of, and that may be thus stated: whatever it was proper under the circumstances for a prudent guardian to spend is proper to be allowed, and whatever is beyond that line ought to be disallowed.

The only rule that can be laid down in such a case is that the boy should be brought up in such a way as is appropriate to the position which he is afterwards to fill. This is simple enough; but it is obvious that it opens a wide field of inquiry, so that it is impossible to say what ought or ought not to have been spent without having the circumstances of each case before one. It is plain that the disposition and tendencies of the boy himself must be considered by a prudent guardian who intends, having the goal which is to be reached before him, that the boy should be properly fitted for the station in life which he is afterwards to fill; that he should neither be lavishly supplied according to his own will, nor, on the other

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hand, so treated with false economy that he might, and probably would, have an entirely erroneous view of his responsibilities when he attained his majority.

My Lords, I confess for myself it would be to my mind absolutely impossible to go through each of the leading topics which have been made the subject of inquiry at your Lordships' bar, and to affirm or to deny as to those items which had been contested that they were properly debited to the mother, or were properly expended by the mother in the course of her guardianship.

My Lords, I take in the first place the education of the boy; and I think it is necessary to give to that word "education" a very wide signification. It is not a question simply of what literary accomplishments he may become the master of, but he is to be fitted for life as a gentleman inheriting ample means and having duties in the place in which he is to exercise his functions afterwards, and it may be (I am only speaking now generally) appropriate and proper that, apart from keeping up the house, which, it can hardly be denied, could not be abandoned without injury to the estate, he should also be accustomed to the amusements and habits of those with whom he has afterwards to associate and among whom he is to live, and that he should be, as his mother, I think, in one place says, acquainted with the tenants among whom he is to reside and upon whom he is to exercise an influence.

My Lords, passing on to another matter, one cannot help thinking that during his education at Eton (still using the word "education" in a very extended sense) it may have been very proper and appropriate that he should be familiar with the amusements which are there in vogue, and also that he should be as much as possible associated with his own mother at that time. I confess there is one passage of the Lord Ordinary's judgment with which I cannot say that I feel myself in harmony. The Lord Ordinary, speaking of an argument which had been urged by the mother, or by those who were representing her, that it was at the boy's own desire, says: "I think there has been too much of this sort of thing in the defender's case. Her argument repeatedly has been that the boy wanted

her to do this or that; therefore she did it, and therefore he must pay for it. It was no part of her duty as his guardian to gratify every whim of a rather headstrong lad, and if she did so out of good nature, or for the sake of making things pleasant at the time, it by no means follows that he should be compelled to bear the cost." My Lords, I think that is an inadequate view of this question. Assuming the part which the mother has to play is that of a person who is really actuated, and only actuated, by a desire for the heir's good, including in that not only the mere increase of his temporal wealth, but that which is invaluable to a young man, namely, that he should have the association and interests belonging to his class, that he should have the advantage of association with his own mother and the influence of a mother, the value of which to a young man is inestimable—that if she had not herself been the guardian, but some other person had been the guardian, and he was considering what would be the best for the lad's real interest, I cannot doubt that a prudent guardian would have said to himself, "It may be that I can get a person for pay to look after this young man; it may be that he would live cheaper in a place that I should appoint, and by associating with a person who would, at much less expense than his mother, maintain the common home in which the two were to live"; but I cannot help thinking the guardian would also say to himself, "No person can be so useful a guardian, no person can be so likely to bring up the lad well, and look after him, and associate with him in a way calculated for his permanent benefit, as his own mother"; and therefore one would think that a prudent guardian would be quite justified in paying a much larger sum, in drawing much more upon the funds at his disposal as a guardian, for what I have described as the inestimable advantage of the boy living with his mother in the style and manner which it would become proper for him to maintain afterwards.

My Lords, it seems to me that, taking that view, it is impossible to put your finger upon a particular piece of expenditure and say it was not proper that he should have this or that—it was not proper that the mother should have a summer residence for herself in the immediate neighbourhood of Eton.

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Taking that item by itself as if it were the only thing you were to regard, I can quite well understand that a great many of those things might be rejected as extravagant and improper. It seems to me, with submission to the Lord Ordinary, that that is not the real question we have to determine. The question is what, under the circumstances as they have turned out, was proper expenditure. I do not reject the teaching of experience. We have to look at the matter now after the fact. I believe it to be perfectly legitimate to say that if this had been a question which the Court were considering beforehand as to what would, could, or might be appropriate expenditure for this boy, it may be that one would not have been able to anticipate that this or that sort of expenditure ought to be incurred; but I do not reject the teaching of experience, and I do not reject the fact which the Lord Ordinary himself refers to, that the boy with respect to whom these inquiries arise was a headstrong boy very desirous of having his own way. The question of how a boy of that character ought to be treated is a matter which is eminently a question for a prudent guardian to consider; and if the associations with which the mother was able to surround him at Eton, and if the fact that he was amply supplied with money, more amply perhaps than a priori would be considered the proper thing to do, involved a certain amount of expenditure, when we are looking at the question in the light of experience it appears to me that a great deal of that expenditure was most appropriate, most wise, and conceived not only in the spirit dictated by the love of a mother for her son, but that it is what a prudent guardian who stood in no relation of blood or kindliness would advise to be done.

My Lords, under these circumstances, as I say, it is impossible, taking a broad view of this case, to do more than to say that the style of living and the mode in which he was being brought up, and the circumstances with which he was surrounded, undoubtedly disclose a state of things in which it was a prudent course for a mother as guardian to do many things which a priori one might have said would have been beyond the ordinary mode in which one would treat a boy of that age.

My Lords, with respect to some part of the case your Lordships are not called upon to form any judgment, because the candour of the learned counsel who has ably argued on behalf of the defender at your Lordships' bar has admitted that it is impossible to maintain some of these specific items as sums which ought to be allowed—for instance, the claim in respect of Forest Farm, as to which it cannot be denied that it is hardly susceptible of being sustained. Though, as I said just now, one cannot lay one's finger always upon a particular form of expenditure, and say this was undoubtedly authorized and proper, there are some things of which one can say certainly they were not. I think your Lordships have been very fairly treated by the learned counsel in the arguments they have addressed to us in eliminating as far as possible what really was not susceptible of argument on behalf of the appellant.

My Lords, the history of the case seems to me in some respects a very painful one. I cannot help thinking that many of the things which are now made subject of complaint and are susceptible of argument after the event are matters which undoubtedly were done for her son at the time by a loving and devoted mother, who would probably have given anything to him.

Now, my Lords, while I say that, I cannot help feeling that there are some lines which must be sharply drawn, and, notwithstanding that the defender is a mother, one must not diminish, if one can help it, the obligation upon a person who is managing the estate and effects of another to be able to render an account afterwards of what he or she has done. I cannot help feeling, therefore, with respect to a great many of these things, when the mother is challenged (whether one would have expected the son to raise the point or not is another question) she has only herself to thank for the consequences of disregarding the very wise advice of those whom she had at first consulted to keep accounts. She was bound to keep accounts; and if in any respect she has suffered—and I cannot help feeling that she must have suffered very bitterly in having to defend an action of this sort against her son—she had to some extent brought it upon herself by her neglect to follow

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the wise advice that was given to her, by keeping accounts so as to be able to shew what in fact she had spent, and in respect to what matters she had spent it.

I do not propose to go into details. As I have said, I do not think the matter is susceptible of being treated as if one could go through every item of this account, or even heads of the account, and say what was spent, or what ought to have been spent, in a particular month or in a particular year. Speaking generally, it appears to me that her mode of treatment of her son, regarding her simply as a guardian, was not only most kind, which might be expected, but also most wise. The particular disposition and tone which the son adopted, and which may be seen, both from his own correspondence and from the reports of his tutors at Eton, shew that questions of great difficulty arose as to the mode in which he should be kept from borrowing money by supplying him with money amply, and the mode in which he should be kept away from certain associations which might be injurious to him in after life; all the efforts were dictated, I have no doubt, not only by affection, but by wisdom. Still, having said all that, the question remains, and a very puzzling question it would be if one were to strive to go into it as a matter of minute detail, whether or not the allowance that has been hitherto made by the Courts below has been exactly what your Lordships would desire. My Lords, I cannot help thinking that they have drawn the line too narrowly—that the amounts which have been allowed in respect of upkeep and education have been too strictly limited. Therefore I have to move your Lordships that the judgments, so far as they have drawn too narrow a line, should be reversed, and that your Lordships should take a somewhat more liberal and wider view. I propose that the interlocutor of the First Division should be varied to the following extent and effect: That the appellant shall be entitled, in lieu of the yearly allowances made to her by the interlocutor in the name of upkeep of establishment and maintenance of the heir, to take credit in account for an allowance at the rate of 3000*l.* per annum, such allowance being in addition to the sums advanced by her to the heir, amounting to 2205*l.*, which are specified in the Lord Ordinary's interlocutor

of April 22, 1895. That is the substance of what I shall move your Lordships. Then one has to deal with the costs. As I have said, I think the circumstances shew that there has been a considerable departure from what I would call the accurate business keeping of accounts by the appellant, and I think in respect of that matter it is impossible to say that your Lordships could visit altogether upon the heir the costs which have been incurred in these somewhat painful proceedings. I think, therefore, that the interlocutor of the Lord Ordinary dated November 13, 1895, and the interlocutor of the First Division, should be reversed, first, in so far as they relate to or decern for the expenses of process; and, secondly, in so far as they fix or decern for the balance due by the appellant; that each of the parties shall bear the expenses of process hitherto incurred by them in the Court of Session, and that the respondent shall pay to the appellant her costs of this appeal; that the interlocutor appealed from except in so far as hereby varied or reversed be affirmed, and the cause remitted to the First Division of the Court.

LORD WATSON. My Lords, this case comes before us in a very unsatisfactory shape. The appellant acted for nearly ten years as the guardian of the respondent, who is her only child. During that period she did not, as it was her plain duty to have done, keep tutorial or curatorial accounts, shewing the precise sums which from time to time were spent out of the income of the minor's estate upon his education and maintenance. Unfortunately, the kindly relations which had previously subsisted between the mother and son ceased about the time of his attaining his majority—shortly after which he raised the present action of accounting. The investigations which have been made in the course of the action afford sufficient materials for ascertaining the amount of the expenditure upon the minor's estate, which entirely consisted of land, and also the amount of the net income derived from it. But the family expenditure of guardian and ward had been massed together, and there are no materials for determining with anything like precision whether some of these outlays were or were not, at the time

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when they were made, meant to come out of the funds of the minor. I have difficulty in resisting the conclusion that there are various charges for which the appellant now seeks to take credit which, at the time when they were incurred, were not intended to fall upon the minor, and would in all probability never have been placed to his debit had it not been for their subsequent disagreement.

I agree with the learned judges below in thinking that the presumption must in dubio be against a guardian who has failed to keep regular accounts; but I am of opinion, at the same time, that a guardian who has in other respects done her duty by the ward, is entitled, even in the absence of such accounts, to a fair and reasonable allowance out of the income of his estate. In estimating the amount of the allowance, the only test which occurs to me is to consider what sums would, in the circumstances of this case, have been allowed to the mother by the Court, or by an independent guardian, in respect of the minor being educated by her, and occupying along with her the principal residence upon his own property.

Keeping that principle in view, I have come to the same conclusion with your Lordships in regard to the increased allowance which ought to be made to the appellant, in substitution for the annual sums with which she has been credited by the judgment of the First Division. After the observations which have been made by the Lord Chancellor, in which I concur, I do not think it necessary to state the considerations which have led me to that result. I only desire to explain that the allowance has been estimated with reference to the whole period of minority and then distributed, and that it does not necessarily represent what ought to have been the amount allowed for each particular year.

LORD HERSCHELL. My Lords, I am entirely of the same opinion, and I desire only to add a word or two. I agree with my noble and learned friends that it is impossible to lay down any rigid rule in a case of this sort; but I think the test is that which my noble and learned friends have pointed out: the sum allowed ought to be such as it would be reasonable for an inde-

pendent guardian or curator to allow to the mother for the maintenance of the child and of the establishment; and in determining what is reasonable all the circumstances of the case must be taken into account, the leading consideration, in fact as regards the amount, one may say, the governing consideration, being the interest of the heir.

LORD SHAND. My Lords, concurring as I do, not only in the judgment proposed, but in the views which your Lordships have stated as the ground of that judgment, I think it unnecessary to add anything to what has fallen from your Lordships.

Ordered:—That the said interlocutor of the Lords of Session in Scotland of the First Division, of February 25, 1896, *complained of in the said appeal, be, and the same is hereby, varied to the following extent and effect: That the appellant shall be entitled, in lieu of the yearly allowances made to her by the said interlocutor, in name of upkeep of establishment and maintenance of the heir, to take credit in account for an allowance at the rate of* 300*l. per annum from July* 26, 1883, *to April* 4, 1893; *such allowance being in addition to the sums advanced by her to the heir, amounting to* 220*5l., which are specified in the Lord Ordinary's said interlocutor of April* 22, 1895: *Further Ordered, that the said interlocutor of the Lord Ordinary of November* 13, 1895, *and also the said interlocutor of the Lords of Session of the First Division, of February* 25, 1896, *be, and the same are hereby, reversed* (1.) *in so far as they relate to, or decern for, expenses of process, and* (2.) *in so far as they fix or decern for a balance due by the appellant: Further Ordered, that the said interlocutors appealed from, except in so far as hereby varied or*

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reversed, be, and the same are hereby, affirmed: Further Ordered, that each of the parties shall bear the expenses of process hitherto incurred by them in the Court of Session, and that the respondent shall pay, or cause to be paid, to the appellant, the costs incurred by the said appellant in respect of the said appeal to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments: And it is further Ordered, that the cause be, and the same is hereby, remitted to the First Division of the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and judgment, &c.

Lords' Journals, July 27, 1896.

Agents for appellant: *Martin & Leslie, for Keith R. Maitland, W.S., Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens, for J. & F. Anderson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

MEDCALFE AND OTHERS . . . . . APPELLANTS;

AND

COX AND OTHERS . . . . . RESPONDENTS.

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SECOND APPEAL.

University—Affiliation and Incorporation of Colleges—Consent, Condition attached thereto — Ultra vires — Reduction — Jurisdiction — Universities (Scotland) Act, 1889 (52 & 53 *Vict. c.* 55), *ss.* 15, 16, 21.

The Universities (Scotland) Act, 1889, s. 16, provides: "Without prejudice to any of the powers hereinbefore conferred, the commissioners" charged with the administration of the Scottish universities "shall with respect to the University of St. Andrews and the University College of Dundee have power to affiliate the said University College to and make it form part of the said university, with the consent of the University Court of St. Andrews, and also of the said college, with the object, inter alia, of establishing a fully equipped conjoint University School of Medicine. . . ." By s. 15, sub-s. 3, "The University Court, or any college which under this Act shall have been affiliated to the university, may respectively at any time thereafter resolve that such college shall cease to be affiliated to such university. . . ." By s. 21, "After the expiration of the powers of the commissioners, the University Court of each university shall have power to make such ordinances as they think fit with the approval of Her Majesty in Council. . . ." (2.) with respect to "Altering or revoking any of the ordinances affecting such university which have been or may be framed and passed under the Universities (Scotland) Act, 1858, or this Act, and making new ordinances."

An agreement purporting to be the consent required by s. 16 of the Act of 1889 contained, inter alia, a stipulation that the said union should, as regards duration, be permanent, and dissoluble only by Act of Parliament:—

Held, that the stipulation was not ultra vires, for ss. 15 and 21 give no power to revoke an affiliation of the nature of an incorporation which had the effect of merging the college into the university with a joint object:

Held, also, differing from the decision of the Second Division of the Court of Session, that that Court had jurisdiction to decide the legal question notwithstanding the fact that the consent sought to be set aside was before the Universities Committee of the Privy Council in respect to a pending ordinance.

APPEAL from a judgment dated March 4, 1896, of the Second Division of the Court of Session, Scotland. (1)

This litigation was the sequel to the proceedings reported. (2)

(1) 23 R. 559. (2) [1895] A. C. 328.

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The appellants, Medcalfe and others, were certain members of the University Court, and of the Senatus Academicus of the University of St. Andrews. The respondents represented the University College, Dundee.

In 1894 the appellants brought this action for—(1.) reduction of an agreement bearing to be on behalf of the University Court of St. Andrews, and on behalf of the Council of the University College, Dundee, consenting to the college being affiliated to and made part of the University of St. Andrews, and relative documents; (2.) for reduction of an order dated March 21, 1890, by the Scottish University Commissioners proceeding on the agreement affiliating the college with the university. In that litigation the Second Division, in accordance with the view of the majority of the judges in Scotland, on December 19, 1894, assoilzied the respondents. On appeal this House, on April 8, 1895, pronounced an order finding that the appellants were entitled to reduction of the order dated March 21, 1890, of the commissioners on the ground that it was a document of the nature of an ordinance under s. 20 of the Universities (Scotland) Act, 1889, and that it had not been laid before both Houses of Parliament, and thereafter submitted to Her Majesty in Council in terms of that section. Their Lordships also held that the consequential order of April 10, 1890, declaring the new University Court of the university duly constituted, must also be reduced. That decree not exhausting the conclusions of the summons, the cause was remitted back to the Second Division of the Court of Session to give effect to the above decision; and to dispose of the conclusions of the summons with respect to the documents first, second, and third, called for and sought to be reduced. These documents were: (1.) A minute of the University Court of the University of St. Andrews, dated February 15, 1890, bearing to consent to the union of University College, Dundee, and the University of St. Andrews. (2.) The agreement between the University of St. Andrews and the University College of the same date; and on which the orders of the commissioners were based; and (3.) a docquet appended to a copy of a letter of the clerk of the commissioners dated March 4, 1890, bearing to be a consent by

the University Court of St. Andrews to the alterations made by the commissioners on the terms of the agreement.

The appellants' grounds for reduction of these documents were: That the agreement was ultra vires in respect that it (art. 1) provided that, "The said union shall, as regards duration, be permanent, and dissoluble only by Act of Parliament," which they alleged was a consent to affiliation upon absolute and irrevocable terms, and at variance with ss. 15 and 21 of the Act of 1889. (1) Secondly, they maintained that art. 4 of the agreement gave a double representation for Dundee College on the University Court; and, thirdly, that art. 6 gave the professors of Dundee College the status of professors of the university; and further, that the docquet was invalid, it not having been considered by the University Court. After the commissioners' order of affiliation dated March 21, 1890, had been challenged, and before its merits had been legally considered, the commissioners on February 3, 1894, issued another ordinance in regard to which the statutory procedure had been observed. In due course that ordinance came before the Universities Committee of Her Majesty's Privy Council for consideration, but was adjourned to await the decision of this action.

This new ordinance (No. 46) contained this: "Without prejudice to, but in corroboration of, the order made by the said commissioners on March 21, 1890, the University College of Dundee is hereby affiliated to and made to form part of the University of St. Andrews, subject to the conditions set forth in the agreement scheduled to the said order, and which order and agreement are set forth in Sched. I. hereunto annexed." The said order and agreement were identical in terms to the order and agreement sought to be reduced.

On June 4, 1895, the Second Division of the Court of Session applied the judgment of this House and reduced the orders of March 21 and April 10, 1890. And on March 4, 1896, the same Division dismissed the remaining conclusions for reduction on the ground that the validity and effect of the documents sought to be reduced were questions within the jurisdiction of the

(1) See the head-note.

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Universities Committee of Her Majesty's Privy Council in dealing with the second ordinance.

July 23, 27. *Dickson, Q.C., Solicitor-General for Scotland,* and *Widdrington Byrne, Q.C.* (with them *Pitman,* of the Scottish Bar), for the appellants. The legal questions should have been decided by the Court of Session. The University Court had no power to enter into an agreement. It had only power to give consent to affiliation, Yes or No; which was a very different thing to consenting to an agreement containing detailed provisions. Further, the agreement's first article contravenes ss. 15 and 21 of the Act.

[LORD HERSCHELL. Can a document which has no effect on the commissioners or other persons be reduced? If the conditions are inoperative, what is there to reduce?]

The commissioners have acted on these conditions as if the agreement stereotyped their powers.

[LORD HERSCHELL. They were not bound to do so.]

Asher, D.F., Q.C., and *Henry Johnston* (with them *Clyde,* all of the Scottish Bar), for the respondents. First, the judgment of the Court of Session is right. Secondly, the agreement is in no respects open to reduction. It contained the terms on which the parties agreed to be affiliated or incorporated; but any interested person may petition Her Majesty in Council and ask that the conditions therein shall be disapproved of: s. 20. It is only a document on its way to be made an ordinance. By s. 16 the object of joining the University College, Dundee, to the University of St. Andrews was to establish a fully equipped joint medical school; and it is impossible to contend that either party can at any time draw back and leave chaos after the medical school has been set up.

Sects. 15 and 21 give no power to put an end to an affiliation or incorporation of this nature: those sections refer to such matters as are contained in s. 14, concerning management, &c.

Dickson, S.-G., in reply.

LORD HALSBURY L.C. My Lords, in this case I confess I have had some difficulty in following the objections which have

been made, and I am afraid my difficulty has not been removed yet. Whatever may be the jurisdiction to reduce documents, about which I am afraid my mind is not very clear even up to the present moment, it appears to me that it is enough to say that no ground has been made good at present in this case to justify such a proceeding.

My Lords, I propose to deal very shortly with the only point which, as it seems to me, the case properly raises, and that is what has in fact been done, and whether any objection can properly be raised to what has been done. In the first place, the document sought to be reduced has been variously described as a consent or an agreement. I do not think it is very material to consider whether it is the one or the other. As a matter of fact, it is one of the documents which formed a stage towards something which was ultimately to become an operative document in the sense in which the Dean of Faculty used those words. But, apart from considering what its nature is or what the power of reducing it was, if it were susceptible of reduction on any grounds, it appears to me that the objection to it fails. What was consented to, and the form in which it was consented to, appears to me to come within the Act of Parliament. That brings us back to the question, What has in fact been done? As I understand it, the objection is this: We want to keep alive by the consent we give the power, if it is thought proper, to dissolve the union which shall ultimately be made (I am using words different from those of the statute on purpose), and this document, which is to be made in pursuance of the power given by the statute, does something which is inconsistent with the statute. That is the objection. Well, my Lords, all I can say is that I think it is exactly in conformity with the statute, and that the ordinance ultimately made is completely covered by the authority which the statute conveys.

Then we come to what is the real point, and the only point in this case, which seems to me to be in truth susceptible of argument, namely, the point upon the 21st section, and the question which arises under the 2nd sub-section of the 21st section. The only point is this: It is said you must keep alive

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and applicable to a completely incorporated university the same powers and the same facilities of dissolving the union which exist in merely affiliated bodies.

My Lords, it must be conceded, I think, that the language of the statute and the mode in which the words are used are perhaps not a model of draftsmanship, but the substance of it is clear enough. There is one thing which the statute describes as affiliation. Two separate institutions are to have such a bond of union between them as may be called affiliation. What that bond is and how far it involves the management of the two concerns it is immaterial to inquire. The statute has made the distinction, and the statute must be obeyed. That affiliation can be dissolved at the option of either—that is certain; and the very fact that they are so distinguished, that the partial union between them can be so dissolved at the option of either, is carried out in the statute by this: that in order to be affiliated and to continue affiliated they are absolutely separate institutions and not incorporated into one. Then one comes to those institutions which are to be incorporated into one, so that one forms part of the other. They then become no longer two separate institutions, but one institution; and when that second condition of things has arisen, you must read the statute by the light which the statute itself gives as to what is the meaning of the institution so constituted. When so constituted, let us see what the arrangements contemplated by the statute would come to if the construction now insisted upon were the true one. "Divided again at the instance of either." What does that mean? There is no "either." There are not two, but one. It appears to me, therefore, that the very starting-point of the inquiry shews that the statute never could have contemplated that when they were once united they could be capable of being severed again at the instance of those who at one time had formed an independent institution. I say that the language is not susceptible of that. The whole difficulty of it is, I think, sufficiently exhibited by the mere statement of the proposition. When one comes to consider the subject-matter we are dealing with, an united body, one body which has one finance, it seems to me that it

is impossible to say that that can be the meaning or the construction of the statute.

But, further than that, I think the language is not susceptible of the construction contended for by the Solicitor-General. It does not appear to me that it is possible to suggest that an ordinance which affects an university is an ordinance which is capable of destroying the university. One might just as well say that a Rule Committee which is intended to regulate the process and practice of a Court should as one of its incidents have the power to destroy that Court altogether, and to say that no such Court should exist. I am wholly unable to follow an argument of that sort, and it seems unnecessary to pursue the subject further than that. When once one begins to understand the technical language which is used in the statute, and to apply it to what the statute has enacted, it appears to me to be impossible to concede the proposition that the Solicitor-General contends for.

My Lords, I am not quite sure that I follow the reasoning of the Court below, nor is it necessary to consider it. I take the proposition that is now put before your Lordships; it is one which I cannot agree with, and I think that the order of the Court below was right, whatever reasoning it may have rested upon, and that this appeal ought to be dismissed; and I move your Lordships accordingly.

LORD WATSON. My Lords, I also am of opinion that your Lordships have no alternative except to affirm the judgment of the Court below, although in coming to that conclusion I have not been influenced by the reasons which were assigned by the learned judges of that Court.

My Lords, the only question which is of any importance appears to me to be a very simple one. I do not think it necessary to discuss how far a document of the character of what is termed an "agreement" in this case can be made the subject of a reduction or a declarator of nullity. It is quite sufficient for the disposal of the appeal, in my opinion, that the considerations urged in support of it are, when one comes to examine them, perfectly illusory.

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I shall only say a word upon the most important of them, namely, the objection that one of the conditions of the agreement, which is that the union to be effected by the commissioners shall not be dissoluble except by Parliament, is a condition which infringes the provisions of the Act. That is founded upon the idea that s. 21 will, in the event of and after affiliation and incorporation, give to the University Court of the newly incorporated university a power, subject to the checks provided in the statute, to make ordinances putting an end to that new incorporation and to its own existence. My Lords, I cannot so read s. 21. It gives a power to alter ordinances which affect an existing university—a power on the face of it plainly implying that there is to be no power to destroy the university or to impair the university as then constituted. The only power is to make regulations which shall prevail within the corporation, which is then existing.

My Lords, my view upon this part of the case are confirmed by the provisions of s. 5. The most important governing body with a Scottish university under the Act of 1889 is the University Court. It is to them that the power of making ordinances and of repealing ordinances is committed by s. 21. The constitution of that Court as part of the university is not committed to the commissioners, and cannot in any view of it be said to be committed to their successors, the University Court. The University Court which is to have this power has its constitution prescribed by s. 5 of the statute, which neither of the commissioners nor any one who succeeds them in the right of making ordinances has power to repeal or touch.

My Lords, I shall not refer to any of the other grounds which have been urged in support of this appeal, and I shall simply content myself with expressing my concurrence with the views which have been already expressed by the Lord Chancellor.

LORD HERSCHELL. My Lords, I am of the same opinion. It is not necessary to inquire here, in the view which your Lordships take, whether, upon the shewing of the appellants themselves, there was anything in this so-called agreement which was capable of being reduced, because, looking at the

substance of the matter, I think it perfectly clear that there is nothing in that consent which can be said to be inconsistent with any of the provisions of the statute. The suggestion that the consent could not be made a conditional one, that it must be an absolute Yes or No, appears to me to be incapable of serious treatment.

The other point, that there is conflict with the statute in a clause which commences "Subject to the provisions of the statute," appears to me, to say the least of it, as untenable.

The only remaining point is that with which my noble and learned friends have dealt: whether the provision that the union should be only capable of dissolution by Act of Parliament was inconsistent with the power contained in the statute itself to dissolve that union by an order made under the statute, under the provisions of which the ordinance was made, or is to be made, constituting this University of St. Andrews with the Dundee College incorporated in it. My Lords, I do not think it necessary to say anything upon this point, because I entirely agree with what has been said. I think no violence is done to the statute by construing s. 21 as wholly inapplicable to the revocation of such an ordinance as the present, in so far as it constitutes the University of St. Andrews with the Dundee College incorporated in it.

My Lords, it is quite unnecessary, and it would be out of place now, to say what provisions might be dealt with by an ordinance under s. 21. All that at least seems to me certain on the present occasion is this: that it is hopeless to contend that by an ordinance made under that section, any ordinance, whatever its terms, which constituted the University of St. Andrews with the Dundee College incorporated in it, could be revoked.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, the Court of Session, in dealing with this case, have not advanced to the consideration of the question raised between the parties on the merits, but have held that the action, so far as regards the documents which

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have now formed the subject of discussion, ought not to be entertained because the whole of the matters in controversy ought properly to be discussed before the Universities Committee of Her Majesty's Privy Council. My Lords, I do not think it necessary to discuss this ground of decision further than to say I am not prepared, on the argument we have heard, to agree with it. It appears to me that cases may occur in which, where there is a direct violation of the statute, I shall not say by agreement only, but by the terms of an agreement or consent followed by an ordinance, the Court of Session would have jurisdiction to cut down the proceedings, and should exercise that jurisdiction if called on to do so. It is a satisfaction to me that in this matter, which has been so long a subject of litigation, and in which litigation is so very undesirable, your Lordships are able, on the argument which has been submitted to the House, to deal with the questions which have been raised on their merits, and, to some extent at least, to give a decision on questions which have been much disputed.

My Lords, on those questions I entirely agree with what has fallen from your Lordships. I think the pursuers have failed to shew that their objections to the agreement and relative documents are well founded. The main, and substantial, point on which argument has been maintained is, that the provision of the agreement under its first head—namely, that the union between St. Andrews University and the College of Dundee shall, as regards duration, be permanent and shall be dissoluble only by Act of Parliament—is in violation of or contrary to the provisions of the statute. That argument was based on two provisions of the statute: the first of them contained in the 3rd sub-section of s. 15, and the second in s. 21.

Now, my Lords, in regard to the 3rd sub-section of s. 15, I think one observation only requires to be made. The whole of that section deals with affiliation, and affiliation only. One of its provisions is this: "That the University Court or any college which under this Act shall have been affiliated to the university may respectively at any time thereafter" (that is, after affiliation) "resolve that such college shall cease to be

affiliated to such university." That applies, as it appears to me, to affiliation only; it has no application whatever to such a case as we have before us, where the agreement, which has been followed by an ordinance, is not only that there shall be affiliation, but that there shall be what has been called in the former judgment in this case incorporation. Sect. 16 provides that the commissioners shall have power as therein stated "to affiliate the said University College" (that is, the College of Dundee) "and make it part of the said university." The result of that really is that the Dundee College would be merged in the university, and that the two institutions would no longer be two but one only—the University of St. Andrews. The provision is for incorporation, not affiliation only. The provision, therefore, of s. 15 which applies to affiliation alone, and gives the parties power to resolve that affiliation shall cease after a certain lapse of time, has no application to a totally different class of case, where you have not merely affiliation but incorporation—the College of Dundee merged in and forming part of the University of St. Andrews.

My Lords, the other ground on which it was maintained that the provision of the agreement goes too far and is contrary to the provisions of the statute, is that s. 21 provides that "After the expiration of the power of the commissioners the University Court of each university shall have power to make ordinances" "altering or revoking any of the ordinances affecting such university which have been or may be framed and passed under the Universities Act." It has been maintained that this provision must apply even to the case of an ordinance which provides not only that the college should be affiliated, but should form part of the university. My Lords, I think that so to hold would be straining the provision of sub-s. 2 of s. 21 beyond its true meaning. There appears to me to be great force, indeed irresistible force, in the argument which was submitted by the Dean of Faculty, that the meaning of that clause giving power to alter and revoke ordinances is satisfied by reference to s. 14 of the statute, which contains power to the commissioners to make ordinances with regard to endowments and bursaries and many other matters which are

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closely connected with the administration of the university and with this alone. I think it would be stretching the meaning of these words too far to say that they authorize the altering or revoking of an ordinance which incorporates the college with the university. I accept the view, as it was shortly put by my noble and learned friend opposite, that the ordinances there referred to are not ordinances constituting the incorporated body, but ordinances affecting the university after it has been so constituted, and affecting it in reference to the details of its management and other like matters. It does not embrace the power to destroy the incorporation itself; indeed, after such incorporation has taken place it appears to me that it would be a matter almost inexplicable to go back upon what has been done, and all that has followed the incorporation. That is a very strong consideration, in my mind, for interpreting the words "ordinances affecting such university" in this sense.

The fourth head of the agreement was also objected to; but even if there were force in the criticism on the details of that provision, the provision itself is made expressly "subject to the provisions of the statute"; so the statute must prevail.

My Lords, I am of opinion, with your Lordships, that the case for the pursuer entirely fails on its merits; and if the Court of Session, instead of granting a decree dismissing the action, had granted a decree of absolvitor dealing with the case on its merits, I should have been prepared to affirm that decree.

Interlocutor appealed from affirmed and the appeal dismissed with costs.

Lords' Journals, July 27, 1896.

Agents for the appellants; *Grahames, Currey & Spens, for J. & F. Anderson, W.S., Edinburgh.*

Agents for the respondents: *Martin & Leslie, for J. Smith Clark, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

CARRUTHERS (PAUPER) . . . . . APPELLANT; H. L. (Sc.)
1896
AND
July 13.
CARRUTHERS AND OTHERS . . . . . RESPONDENTS.

SECOND APPEAL.

Trust—Personal Liability of Trustees—Failure to fulfil Trust Directions—Culpa Lata—Respondents not appearing, Costs on Reversal.

Where a testator gives power to his trustees to appoint a factor to the estate who may be one of themselves, but directs them to require annual accounts, the trustees are guilty of culpa lata if they fail to call for annual accounts.

Appeal from the Second Division of the Court of Session, Scotland. (1)

Margaret Carruthers, the appellant, was the only child of the testator, David Carruthers. She came of age in 1892. In 1894 she raised this action against the trustees acting under her father's trust disposition. The respondent, William Carruthers, was at the date of the action the sole trustee. The appellant claimed the replacement of sums lost to the trust by the default of one Grigor, a trustee, acting as factor to the trust. The testator died in 1879, and under his trust disposition and settlement the appellant was left a life-rent interest in the residue of his estate, the fee going to her children, whom failing, to her two uncles. The material clause of the testator's trust disposition as to annual audits, as well as the dates of the few accounts taken by the trustees, will be found set out fully in the judgment of Lord Herschell. The trustees appointed and accepting were three persons—Glegg, Jarvis, and Hector Forbes, residing in Bervie, the testator's brother, William Carruthers, in Glasgow, and Grigor, town clerk of Inverkeithing. The last named had been the testator's law agent, and the trustees allowed him to act as factor to the trust. The testator's debts exceeded his personal property; the bulk of his other property consisted of a pro indiviso part of the estate of Cobbinshaw,

(1) 22 R. 775.

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returning partly mineral royalties and partly rent from a farm. The remaining pro indiviso proprietors of Cobbinshaw were other members of the Carruthers family, whose agents managed the whole of Cobbinshaw and paid to Grigor the income apportioned to the testator's share. The testator's share of Cobbinshaw was heavily burdened, and his portion of the rents and royalties was to a large extent exhausted in meeting the interest due on bonds and other necessary expenses: Grigor on receiving the said income had to pay these creditors. In 1890 there were various disputes with reference to the trust estate and management. The widow made a claim for jus relictæ and terce. A petition was lodged to remove Jarvis, and there was a dispute whether Grigor was entitled to payment as law agent to the trust. Jarvis resigned on March 11, 1891, and Glegg and Forbes about August, 1891.

In December, 1891, Grigor absconded, and on the sequestration of his estate (January, 1892) it was found that he had misappropriated 381*l.* of the trust funds. It also appeared that he had received two sums amounting to 165*l.* in August and November, 1890; that in June, 1888, he was owed a sum of about 61*l.* by the trust; and that he had not paid 130*l.* due as one and a half year's interest on bonds on the estate; and that he had received between May and December, 1891, other sums amounting to about 250*l.* If an account had been taken in January, 1891, it would have shewn Grigor held 104*l.* of trust money.

On June 9, 1894, the appellant raised this action against the trustees for decree that they were bound to replace the sums lost to the trust. The claim against the trustees who had resigned was for the sums received up to October 14, 1891.

The Lord Ordinary (Kincairney), on February 9, 1895, held that gross neglect had not been proved, and assoilzied the trustees from the conclusions of the summons, but without costs.

On June 26, 1895, the Second Division (the Lord Justice-Clerk and Lords Young and Trayner (Lord Rutherfurd-Clark dissenting), affirmed the Lord Ordinary's decision, but gave the trustees their costs. By interlocutor of January 29, 1896, the cause was revived against Ann Forbes, executrix of Hector Forbes,

deceased; and no objection was made by any party to the absolvitor of Jarvis, on the ground that he could not act while a petition was standing for his removal from the trust.

The Appeal Committee allowed the appellant to sue in formâ pauperis, her petition of appeal shewing a primâ facie case under the Act of 1893 (56 & 57 Vict. c. 22). The respondents to the appeal were William Carruthers, Glegg, and Ann Forbes. William Carruthers alone lodged a printed case in answer to the appeal; and on April 27, 1896, the House ordered that the case be heard ex parte as to Glegg and Ann Forbes, they not having lodged a printed case in answer to the appeal though ordered so to do.

July 13. *A. D. S. Thomson* (of the Scottish Bar), for the appellant. The trustees were guilty of culpa lata, or gross carelessness, inasmuch as they did not carry out the distinct directions of the testator with regard to yearly audits. Between the second and third account there was a period of six years. If the trustees had required an account in January, 1891, the 104*l.* would have been paid, and the burden of shewing that it would not rests on the trustees: see Cotton (1) and Fry (2) L.JJ. in *In re Brogden, Billing* v. *Brogden.* (1)

Craigie (of the Scottish Bar), for the respondent, William Carruthers. Trustees are not personally liable for loss sustained by the trust estate unless they have been guilty of culpa lata. A marked distinction has always been drawn between intromissions and omissions. If one trustee receive all the money as factor, the other trustee, if not grossly careless, is not liable: *Thomson* v. *Campbell.* (3) The trustees were found not liable in *Home* v. *Pringle* (4), where they neglected a like direction as here.

[LORD WATSON referred to the Lord Chancellor's judgment in that case on appeal. (5)]

There was no more here than an omission: therefore 24 & 25 Vict. c. 84, applied, namely, that gratuitous trustees shall

(1) 38 Ch. D. 567.
(2) 38 Ch. D. 572.
(3) 16 S. 560.
(4) 16 S. 142.
(5) 2 Rob. App. 435.

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not be liable for omissions. The trustees had found in June, 1888, that there was a balance in Grigor's favour; and, besides, there was interest on bonds and the cost of two law-suits to be provided for; secondly, a clear distinction is to be drawn between the sums received in 1890 and those received by Grigor in 1891, as the latter sums were not bound to be accounted for until January, 1892, by which date Grigor had absconded.

LORD HERSCHELL. My Lords, this is an appeal from interlocutors of the Second Division of the Inner House affirming the interlocutor of the Lord Ordinary. The controversy between the parties arises out of the provisions of a trust deed, by which certain property was vested in trustees for the benefit of the truster during his life (he died on April 7, 1879), and afterwards upon trusts which it is not necessary to enter into beyond saying that if there has been money lost to the trust estate by reason of any acts of the respondents of which the appellant has a right to complain, she has a sufficient interest and title to enable her to sue here and to require that the money should be made good to the trust fund.

The trust deed contained this provision: "With full power to my said trustees to appoint factors either of their own number or other fit persons for uplifting the rents and interest of my said estate, and to hold him liable to them for all omissions, errors, or neglect of management, and for his own personal intromissions with my said estate, and I do hereby direct my said trustees under this settlement, annually, within one month after the 31st day of December in each year, during their administration, to cause their factor to make up an account of the intromissions had by him by virtue hereof in the course of the year ending on that date, and to lay the same with the whole vouchers thereof before them to be by them examined, audited, and (if found to be correct) approved of." Then there is a further provision that in the event of their being dissatisfied with the management of the estate by the factor they may remove him and appoint a new factor in his place.

My Lords, nothing is said in that clause about the appointment of one of their number as the factor with a remuneration to him for his services; but I think there can be no doubt that the intention of the truster in giving the power was to enable them not only to appoint one of their own number the factor, which they could have done without any such power, but also to appoint one of their own number as factor and to pay him remuneration, which without such express power it would not have been competent for them to do. It gave them, therefore, in my opinion, that power which they would not have possessed at common law.

But the truster whilst empowering his trustees to leave in the hands of one of their number the entire collection of the rents and the disposal of them, at the same time guarded that provision with this further one: that the other trustees should at least once in every year, within one month from the termination of the year, examine and audit the whole of the last year's accounts, require vouchers, and see that the accounts had been properly kept and that the money had been properly received and properly applied. The trustees appear to have largely disregarded this provision. The first account delivered comprised the items of account between the date of the truster's death in 1879 and January 31, 1881. The next account comprised the items between January 31, 1881, and May 15, 1882. No other account was delivered until February, 1888, which included the accounts of nearly six years. In the month of June, 1890, an account was made out shewing the condition of the trust estate down to that period. Some controversy arose as to how far this account was seen or in the possession of the trustees; but it is not, in my view, material, and therefore I do not enter upon that conflict of view. It is enough to say that it is common ground that down to June, 1890, there had been no improper dealing with the trust funds, that at that date there was a sum of 61*l.* 5*s.* 3*d.* due to Mr. Hall Grigor, the factor, and certain other accounts were outstanding. Mr. Hall Grigor was not in express terms appointed factor, but he had been, by the manner of dealing with him and the manner in which the accounts were rendered, clearly appointed

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factor and allowed a remuneration for his services. No question is raised as to his having been a factor duly appointed under the trust deed, and therefore there is no dispute that it was the duty of the trustees to have examined his accounts more frequently than they had done. But, as I have said, down to June, 1890, although there had been a breach of duty on their part in that respect, the trust estate had in no way suffered.

My Lords, during the year 1891 sums of money were received by Mr. Hall Grigor which, after allowing for the balance of 61*l.* odd that had been due to him, left in his hands a sum of 104*l.* 2*s.* 7*d.* Now this sum of money he obviously ought to have applied in the payment of certain ground-rents or the interest on heritable bonds on the land which formed part of the trust estate, which was at that time and had been for a considerable time due. This sum of money never was in any way applied to trust purposes by Mr. Hall Grigor. During the year 1891 he received further sums on account of the trust estate; and at the end of 1891 he absconded, leaving the whole of these sums of money due from him to the trust unaccounted for.

Now the first question is whether the appellant is entitled to an order that the respondents should make good to the trust estate the sum of 104*l.* 2*s.* 7*d.* About the breach of duty on their part in not requiring the delivery of accounts at the commencement of the year 1891 and auditing them, there cannot be two opinions. But it is said that the trustees are protected by the clause of immunity, which is now to be taken as inserted in all trust dispositions, against omissions on their part; that the not requiring of the delivery of and not auditing the accounts was an "omission"; that the clause of immunity protects them against it, and therefore they cannot be made liable in respect of it. My Lords, it is well settled that the clause of immunity to which I have referred does not protect in a case of culpa lata or gross negligence. The first question, therefore, which I proceed to consider is whether in this case there was culpa lata on the part of the trustees.

Now they were entrusted with a power which they had not at common law, which I have already alluded to; but the

truster, whilst he enabled them thus to employ one of their number as factor, insisted upon a check on the proceedings of that factor. It was the very thing which in that case he left the other trustees to do, to exercise that check by an annual audit. Nothing can be more emphatic than the terms of the provision; and it was clearly made a condition of their leaving the trust receipts and expenditure to one of their number as factor that they should exercise that supervision. My Lords, can it be said under those circumstances that where the trustees fail to exercise that check, and, taking advantage of the power given them to leave the trust management to another, do not supervise the action of that other in the manner expressly directed by the truster, there has not been culpa lata on their part? I entirely concur with Lord Rutherfurd-Clark in thinking that such conduct on their part constitutes culpa lata. It is admitted that, if that view be correct, the immunity clause does not protect the trustees. Then what is the extent of their liability? They are liable, as it seems to me, for all the results naturally flowing from the breach of duty on their part; and I think where this culpa lata is shewn, and it might be reasonably concluded that the trust would not have suffered as it did if the duty had been observed, it lies with the trustees to shew, if they seek to absolve themselves on that ground, that no benefit would have accrued to the trust if they had discharged their duty, and that the loss would have been precisely the same, and must have been precisely the same whether they did so or not. I do not think they are entitled to insist upon the Court speculating as to whether it is or is not possible that, even if the trustees had done their duty, the loss would equally have resulted. In the present case I own I have a strong impression and belief that if they had called for accounts in January, 1891, or at the end of 1890, in order that they might be audited in the course of the following January, this 104*l.* would have been applied in the payment of the outstanding ground-rents, and that the accounts would not only have appeared upon the face of them to be perfectly proper, but would have been perfectly proper; and that 104*l.* would have been applied in discharge of the liability of the trust, and

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therefore would not have been lost to the trust estate. If that be so, then this 104*l.* has been lost to the trust in consequence of the failure of the trustees to do their duty—a clear, obvious, and expressly imposed duty which they failed to discharge.

My Lords, the only other question is whether the further sums which were received by Mr. Hall Grigor, the factor, in the course of 1891, and misappropriated by him, can be recovered against the trustees. The case there seems to me to be very different. If the conclusion is a probable one that the accounts delivered in 1891 would have been in order, and all would have appeared to have been properly paid, then there would be nothing to excite the suspicion of the trustees, and they would have been acting with perfect propriety if during the rest of the year 1891 they had left the matter as theretofore in the hands of Mr. Hall Grigor, in which case he would have received the moneys—the time for audit would not have arrived, and he would have misappropriated them before the trustees had any opportunity of ascertaining that anything was wrong. Under those circumstances I do not see my way to hold the respondents liable for more than this sum of 104*l.* 2*s.* 7*d.*, which was in the hands of the factor prior to the termination of the year 1890. I think, therefore, that the proper course in the present case will be to reverse the interlocutors appealed from, and to declare that the respondents are bound to make good to the trust estate the sum of 104*l.* 2*s.* 7*d.*, with interest from January 31, 1891. As regards costs, I think the appellant must receive the costs in the Inner House and also the costs in this House, those costs to be taxed according to the rule laid down where the appellant sues in formâ pauperis; and I move your Lordships accordingly.

LORD WATSON. My Lords, I agree in the judgment which has just been moved by my noble and learned friend.

I am not altogether satisfied in this case that what was done or left undone by the trustees amounted to a mere "omission" on their part. They have from the outset of the trust administered it through one of their own number, who was appointed to be their factor, and was remunerated for his

services in that capacity out of the trust funds. The whole management of the trust was devolved upon the factor. At common law the trustees had no power to take that course. Under the trust they had power to do so, but subject to this very plainly expressed condition, that there should be an annual and regular audit of the factor's accounts. With that audit the trustees practically dispensed. That is said to have been a mere matter of omission, and, in one view that may be taken of it, it was a mere matter of omission; but the result, and the necessary result, was that their administration as actually conducted was sanctioned neither by the common law of trust nor by the provision of the deceased's deed. I am not prepared to hold that a course of administration which cannot be defended or justified either on the ground of its being consistent with the common law or on the ground of its being consistent with the provisions of the trust deed can be regarded as a mere "omission."

But it is unnecessary in this case to go any further than the character of the act, even on the assumption that it ought to be treated as a matter of omission. The immunity clause of the Act of 1861, or a similar immunity conferred by the terms of a trust deed, does not afford a protection to trustees against any act or omission which, according to the law, is regarded as constituting culpa lata. My Lords, I think the acting of the trustees in this case did amount to culpa lata. I should be very sorry to hold that the systematic disregard of a check enacted by the testator in his trust deed, a reasonable check, and in some cases, as in the present, a necessary precaution, does not constitute culpa lata.

My Lords, upon the amount of damage I do not think it necessary to say anything. I entirely agree with the observations which have been made by the noble and learned Lord on the Woolsack in regard to that part of the case.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I also concur.

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LORD DAVEY. My Lords, I concur.

Ordered, that the interlocutors so far as complained of in the appeal be reversed with a declaration that the respondents are bound to restore and make good to the trust estate the sum of 104*l.* 2*s.* 7*d. with interest thereon at the rate of* 4*l. per cent. per annum from January* 31, 1891 *: Further ordered, that the respondents pay to the appellant the costs incurred by her in the Inner House : Further ordered, that the respondents pay to the appellant the costs incurred by her in respect of her appeal to this House, the said costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis, and the amount thereof to be certified by the Clerk of the Parliaments : Further ordered, that the cause be remitted back to the Second Division of the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment : And further ordered, that unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the Bills during the Vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.*

Lords' Journals, July 13, 1896.

Agents for appellant: *Ranger, Burton & Frost, for Finlay & Wilson, S.S.C., Edinburgh.*

Agents for respondent William Carruthers: *Robins, Hay, Waters & Lucas, for Mackenzie & Black, W.S., Edinburgh.*

END OF VOLUME.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1896, will be as follows :—

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In the Second Series,
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Where a defendant takes out a summons and obtains an order for further time for delivering his defence, he "takes a step in the proceedings" within the meaning of the Arbitration Act 1889 s. 4, and is not afterwards entitled to apply under that section for a stay on the ground

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that the proceedings were brought in respect of a matter agreed to be referred.

The decision of the Court of Appeal ([1895] 1 Q. B. 850) affirmed.

The Supreme Court of Judicature (Procedure) Act 1894 s. 1 sub-s. 1, which enacts that no appeal shall lie, without the leave of the judge or of the Court of Appeal, from certain interlocutory orders or judgments made by a judge, has no application to appeals to the House of Lords from the Court of Appeal, and does not affect the Appellate Jurisdiction Act 1876 s. 3. FORD'S HOTEL COMPANY *v.* BARTLETT - - 1

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A bill for 500*l.* was presented for acceptance with a stamp of much larger amount than was necessary and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned it into a bill for 3500*l.* Being sued on the bill by a bonâ fide holder for value the acceptor paid 500*l.* into court:—

Held, affirming the decisions of Charles J. ([1894] 2 Q. B. 660) and of the Court of Appeal ([1895] 1 Q. B. 536), that the acceptor owed no duty of precaution to the plaintiff, and was guilty of no negligence, and was entitled to judgment.

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—— *Vint* v. *Padget* (2 D. & J. 611) followed 187
See MORTGAGE.

—— *Warminster, &c., In re* (25 Q. B. D. 450) approved - - - - 315
See HIGHWAY.

—— *Young* v *Grote* (4 Bing. 253) commented on
See BILL OF EXCHANGE. 514

CHARTERPARTY—Damages by way of demurrage—Lay-days - - - 108
See SHIP. 2.

CHEQUE—Forged—Liability of bank - 257
See PRIVY COUNCIL APPEALS. 1.

CIVIL SERVANT—Power to dismiss at pleasure
See PRIVY COUNCIL APPEALS. 10. 575

COLLEGES — Affiliation — Consent, Condition attached thereto - - - 647
See UNIVERSITY.

COLUMBIA—Laws of.
See PRIVY COUNCIL APPEALS. 2.

COMPANY —*Prospectus* —*Fraudulent Misrepresentation—Shareholder—Repudiation by Plea—Forfeiture of Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

Where a person is induced by a fraudulent prospectus to apply for an allotment of shares, and his shares are afterwards forfeited by his failure to pay calls, he ceases to be a shareholder and becomes a mere debtor to the company, and if he has done nothing to affirm the contract he may repudiate it and defend an action for calls on the ground of the fraud.

A prospectus which merely specifies the dates of and names of the parties to contracts in compliance with the Companies Act, 1867, s. 38, does not give notice of circumstances contained in the contracts which are material to be known and the omission of which causes the prospectus to give a false impression.

The decision of the Irish Court of Appeal ([1895] 2 I. R. 207) affirmed. AARON'S REEFS, LIMITED *v.* TWISS - - - - 273

2. —— *Shareholder — Payment of Shares in advance of Calls—Interest out of Capital—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 14, 19, 38; *Table A*, *s.* 7.

The directors of a company limited by shares may receive payment from a shareholder of any amounts remaining unpaid on his shares, and may pay out of capital interest on sums so paid up in advance of calls, either under Table A of the Companies Act, 1862 (if applicable), or under provisions to the same effect in the company's

COMPANY—*continued.*
articles of association, provided they do so in good faith and in the honest exercise of the discretion confided to directors.

The decisions of Stirling J. and the Court of Appeal ([1896] 1 Ch. 397) affirmed.

Dale v. *Martin* (9 L. R. Ir. 498; 11 L. R. Ir. 371) approved. LOCK *v.* QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY - 461

3. —— *Winding-up—Public Examination of Promoters, Directors and Officers — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

The Court has no jurisdiction to direct any person to be publicly examined under s. 8, sub-s. 3, of the Companies (Winding-up) Act, 1890, unless the official receiver has made a "further report" under sub-s. 2 from which it appears that in his opinion a fraud has been committed by a person in the promotion or formation of the company, or by a director or other officer of the company in relation to the company since its formation.

And the power to direct a public examination of the persons mentioned in sub-s. 3 does not apply to any one of them against whom a primâ facie case of fraud has not been disclosed by the "further report" of the official receiver. *Ex parte* BARNES - - - - - - 146

—— Shares deemed to be fully paid up — Liability - - - - - 614
See PRIVY COUNCIL APPEALS. 11.

—— Trade carried on partly in the United Kingdom, partly abroad — Income tax - - - - - - 31
See REVENUE. 1.

CONDITION—Compliance with, in fire insurance policy—Non-suit - - - 372
See PRIVY COUNCIL APPEALS. 14.

CONSENT—Condition attached thereto—Ultra vires - - - - - - 647
See UNIVERSITY.

CONSOLIDATION — Mortgages — Redemption - - - - - - 187
See MORTGAGE.

COSTS—Appeal—Consent of guardians - 443
See POOR-RATE. 1.

—— Consultations with counsel — Shorthand notes - - - - - - 594
See PRIVY COUNCIL APPEALS. 13.

—— Jurisdiction of House of Lords over costs - - - - - - 477
See POOR LAW.

—— On reversal — Appellant suing in formâ pauperis - - - - - 659
See TRUSTEE.

COUNSEL — Fees for consultations — Length of - - - - - - 594
See PRIVY COUNCIL APPEALS. 13.

COVENANT—To keep in repair—Lease and sub-lease—Damages - - - 490
See LANDLORD AND TENANT.

CROWN—Power to dismiss Civil servants 575
See PRIVY COUNCIL APPEALS. 10.

CULPA LATA—Annual accounts—Liability of trustees - - - - - 659
See TRUSTEE.

CUSTOMERS — Solicitation of — Sale of goodwill - - - - - - 7
See GOODWILL.

DAMAGES — Parties — Separate causes of action - - - - - 450
See PRACTICE. 1.

—— Repairs—Lease and sub-lease - 490
See LANDLORD AND TENANT.

DEATH—Witness—Judge's note of evidence—Admissibility - - - 133
See DIVORCE.

DEED — Effect of recitals in — Notice—Estoppel - - - - - - 587
See PRIVY COUNCIL APPEALS. 19.

DIRECTORS — Public examination of — Jurisdiction - - - - - 146
See COMPANY. 3.

DISCLAIMER—Revocation - - - 496
See PATENT.

DIVORCE—*Divorce Bill—Substituted Service—Deceased Witness—Judge's Note of Evidence—Admissibility.*

A certified copy of the judge's notes of the evidence of a witness called by the petitioner at the hearing of a petition for divorce a mensâ et thoro cannot, in case of the death of the witness, be received as proof of the matters deposed to by him upon the second reading of a bill for divorce presented by the petitioner. GRIFFIN'S DIVORCE BILL - - - - - - - 133

EMPLOYERS' LIABILITY ACT — Person in charge or control of engine or train 57
See NEGLIGENCE.

ESTATE PUR AUTRE VIE—*Special Occupant—Devolution of Estate—Wills Act* (1 *Vict. c.* 26), *s.* 6.

An estate pur autre vie was created by the conveyance of the appellant's life estate in lands to the appellant and the respondent to hold to the use of them and their heirs upon certain trusts, with a declaration that all the estates and interests conveyed to the respondent were conveyed to her as trustee for an infant:—

Held, that the infant's equitable estate was not an estate to him and his heirs, and that there being no "special occupant" the infant's estate upon his death passed to his administratrix under s. 6 of the Wills Act (1 Vict. c. 26).

The decision of the Court of Appeal in Ireland ([1895] 1 I. R. 44) affirmed. EARL OF MOUNTCASHELL *v.* MORE-SMYTH - - - 158

ESTOPPEL — Contract of indemnity — Evidence - - - - - 231
See PRIVY COUNCIL APPEALS. 12.

—— Effect of recitals in deed—Notice - 587
See PRIVY COUNCIL APPEALS. 19.

—— Negligence—Stamp of larger amount than necessary - - - - 514
See BILLS OF EXCHANGE.

EVIDENCE—Deceased witness—Judge's note of evidence—Admissibility - - 133
See DIVORCE.

EXAMINATION—Promoters, directors and officers—Jurisdiction - - - 146
See COMPANY. 3.

FIRE INSURANCE—Compliance with condition in policy—Non-suit - - 372
See PRIVY COUNCIL APPEALS. 14.

FISHERY — Boundary — Fishings ex adverso glebe land - - - - 120
See SCOTTISH LAW. 2.

FOOTWAY — Repair of, in urban districts — Liability - - - - 315
See HIGHWAY.

FOREIGN ASSETS—Debts chargeable on—Probate - - - - - 567
See PRIVY COUNCIL APPEALS. 20.

FOREIGN POSSESSIONS — Trade carried on partly in England, partly abroad—Income tax - - - - 31
See REVENUE. 1.

FORFEITURE — Shares — Prospectus — Fraudulent misrepresentation—Repudiation
See COMPANY. 1. 273

FORGERY—Cheques—Liability of bank - 257
See PRIVY COUNCIL APPEALS. 1.

FRAUD—Negligence—Stamp of larger amount than necessary - - - 514
See BILL OF EXCHANGE.

GAMING—Securities deposited as "cover"—"To abide the event" - - - 166
See STOCK EXCHANGE.

GOODWILL—*Sale of Goodwill—Canvassing old Customers—Partnership.*

Where the goodwill of a business is sold (without further provision), the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser.

The same principle is applicable to the case where a person has been taken into partnership on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner.

Labouchere v. *Dawson* (L. R. 13 Eq. 322) approved.

The reasoning in *Pearson* v. *Pearson* (27 Ch. D. 145) overruled.

The decision of the Court of Appeal ([1895] 1 Ch. 462) reversed, and an injunction granted on the principle above stated. TREGO *v.* HUNT 7

GRAIN—Duty payable—Grain brought into port of London for sale - - - 457
See LONDON, CITY OF.

GUARDIAN — Maintenance of pupil heir — Accounts - - - - 625
See INFANT.

HIGHWAY — *Footways — Repair of, in Urban Districts—Main Road—Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77) *s.* 13—*Local Government Act* 1888 (51 & 52 *Vict. c.* 41) *s.* 11.

A county council is liable under the Local Government Act 1888 (c. 41) s. 11 sub-s. 2 to make to the urban authority an annual payment towards the costs of the maintenance and repair in an urban district of the paved footpaths upon or at the sides of disturnpiked roads which have become main roads under the Highways and Locomotives (Amendment) Act 1878 (c. 77) s. 13.

The decisions to this effect in *In re Warminster &c.* (25 Q. B. D. 450) and *In re Burslem &c.* ([1896] 1 Q. B. 24) approved. COUNTY COUNCIL OF DERBY *v.* URBAN DISTRICT OF MATLOCK BATH AND SCARTHIN NICK - - 315

HUSBAND AND WIFE — *Jugdment against Married Woman—Separate Estate—Restraint on Anticipation — Arrears of Income — Married Women's Property Act* 1882 *c.* 75 *ss.* 1, 19.

Where a married woman is entitled to property for her separate use without power of anticipation, the restraint on anticipation does not apply to income accrued due; and a judgment creditor may enforce the judgment against income which has accrued due at or before the date of the judgment.

The reasoning on this point in *Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559, 570) overruled.

The decision of the Court of Appeal ([1895] 2 Q. B. 212) reversed. HOOD BARRS *v.* HERIOT 174

IMPRISONMENT — Immunity of members of Provincial House of Assembly - 600
See PRIVY COUNCIL APPEALS. 3.

INCOME TAX—Assessment in name of agent
See REVENUE. 3. 325

—— Exemption—Public library - - 500
See REVENUE. 2.

—— Trade carried on partly in United Kingdom, partly abroad - - - 31
See REVENUE. 1.

INDEMNITY—Contract of—Estoppel—Evidence as to abandonment of claim - 231
See PRIVY COUNCIL APPEALS. 12.

INFANT—*Maintenance— Guardian and Ward—Maintenance and Establishment of Pupil Heir—Accounts.*

Where the mother is the sole guardian of the heir to large estates the sum allowed the mother for the upkeep of establishment and education of the heir ought to be such sum as prudent guardians would allow to her "as mother." To decide what is a reasonable sum all the circumstances of each case must be considered; the governing consideration being what is for the interest of the heir.

Whether the guardian of a minor heir is a relative or not, strict yearly accounts of the administration of the minor's property ought to be kept. BARNES OR ROSS *v.* ROSS - - 625

INJUNCTION — Damages — Joinder — Separate causes of action - - - 450
See PRACTICE. 1.

INSURANCE—Fire—Compliance with condition in policy—Non-suit - - 372
See PRIVY COUNCIL APPEALS. 14.
—— Remedies of insurers—Subrogation - 250
See PRIVY COUNCIL APPEALS. 17.
INTEREST—Payable out of capital - 461
See COMPANY. 2.

JAMAICA—Laws of.
See PRIVY COUNCIL APPEALS. 8.
JURISDICTION—Affiliation of colleges—Consent—Ultra vires - - - 647
See UNIVERSITY.
—— House of Assembly—Order of imprisonment
See PRIVY COUNCIL APPEALS. 3. 600

LANDLORD AND TENANT—*Repair—Lease and Sub-lease—Covenants to keep and yield up in Repair—Damages, Measure of.*

Where a lease contains covenants to keep the demised premises in repair and to deliver them up in good repair, and a sub-lease is granted containing similar covenants with notice to the sub-lessee of the original lease, and the lessee brings an action against the sub-lessee for breach of his covenant to keep in repair, it is right in assessing the damages to take into account the liability of the lessee upon the covenants in the original lease.

The decision of the Court of Appeal ([1895] 2 Ch. 377) affirmed. CONQUEST *v.* EBBETTS 490

LEAVE TO APPEAL—Appeal to House of Lords
See ARBITRATION. 1

LIBEL—*Action for—Misdirection—New Trial—"Substantial Wrong or Miscarriage"—Rules of the Supreme Court, Order XXXIX. r.* 6.

In an action for libel the judge misdirected the jury in favour of the plaintiff upon a material part of the libel and the jury gave a verdict for large damages. The Court of Appeal thought that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction had been the other way, and refused the defendant's application for a new trial on the ground that in their opinion no "substantial wrong or miscarriage" had been occasioned by the misdirection, within the meaning of Order XXXIX. r. 6:—

Held, reversing the decision of the Court of Appeal, that since the assessment of damages is the peculiar province of the jury in an action for libel, and since the jury had not had the defendant's real case submitted to them and might, in assessing the damages, have been influenced by the misdirection, there had been a substantial wrong or miscarriage within Order XXXIX. r. 6 and that there must be a new trial. BRAY *v.* FORD 44

LICENSING ACTS—Liquor laws—Power of prohibition—Distribution of legislative powers - - - - 348
See PRIVY COUNCIL APPEALS. 5.

LOCAL GOVERNMENT—"*Street*"—*Urban Authority—Vesting of "Street" in Urban Authority—Subsoil—Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *ss.* 39, 149.

The Public Health Act 1875, which by s. 149 vests certain streets in the urban authority, does not vest the subsoil.

Therefore where a local Act authorized the urban authority to erect and maintain "in any street or public place, or on land belonging to them or under their control," lavatories for the use of the public:—

Held, that the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them within the meaning of the Public Health Act 1875.

The decision of the Court of Appeal ([1894] 2 Q. B. 867) affirmed. MAYOR, &c., OF TUNBRIDGE WELLS *v.* BAIRD - - - 434

LONDON, CITY OF—*Grain Duty—"Grain brought into the Port of London for Sale"—Manufacture of Grain into other Articles—Metage on Grain (Port of London) Act* 1872 (*c. c.*) *s.* 4.

The Metage on Grain (Port of London) Act 1872 (c. c.) s. 4, which entitles the corporation of London to a duty "in respect of all grain brought into the port of London for sale," applies only to grain brought in for sale as grain, and not to grain brought in to be ground into meal, or manufactured into other articles of commerce, and then sold.

The decision of the Court of Appeal ([1895] 2 Q. B. 652) affirmed. COTTON *v.* VOGAN & Co. 457

MAINTENANCE—Establishment of pupil heir—Accounts - - - - 625
See INFANT.

MARRIED WOMAN—Separate estate—Restraint on anticipation - - - 174
See HUSBAND AND WIFE.

MASTER AND SERVANT—Person in charge or control of engine or train - - 57
See NEGLIGENCE.

MAXIM—"Debitor non præsumitur donare" 95
See SCOTTISH LAW. 3.

MINE—Free miner's certificate—Precious metals
See PRIVY COUNCIL APPEALS. 2. 561

MISDIRECTION—New trial—"Substantial wrong or miscarriage" - - 44
See LIBEL.

MISREPRESENTATION—Credit - - 381
See SCOTTISH LAW. 1.
—— Fraudulent—Prospectus - - 273
See COMPANY. 1.

MORTGAGE—*Redemption—Consolidation—Assignment of Equity of Redemption by one Deed to one Person.*

The doctrine of consolidation of mortgagees laid down in *Vint* v. *Padget* (2 D. & J. 611) and other cases to the same effect has been too long established to be now overthrown.

Therefore where the owner of different properties mortgages them to different persons and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on

MORTGAGE—*continued.*
all, not only as against the mortgagor but also as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title.

The decisions of Romer J. and the Court of Appeal ([1894] 2 Ch. 328; [1895] 1 Ch. 51) affirmed. PLEDGE *v.* WHITE - - 187

NATAL—Laws of.
See PRIVY COUNCIL APPEALS. 9.

NEGLIGENCE—*Master and Servant—Employer and Workman—"Person in Charge or Control of Locomotive Engine or Train upon a Railway"—Employers' Liability Act* 1880 (43 & 44 *Vict. c.* 42) *s.* 1 *sub-s.* 5.

The Employers' Liability Act 1880 by s. 1 sub-s. 5 enacts that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer "who has the charge or control of any . . . . locomotive engine or train upon a railway," there shall be the same right of compensation against the employer as if the workman had not been in his service.

A "person who has the charge or control of a train" does not necessarily cease to have charge of it, within the meaning of the Act, because some of the carriages are uncoupled from one another and from the engine in order that they may be separately dealt with. And those words do not necessarily point only to one person who is in charge of the whole train, but may include persons who have duties to perform in respect of parts of the train.

An engine-driver, employed with his fireman in the discharge of loaded wagons on a railway, took a locomotive engine and several wagons to a point on an incline, and there proceeded with the engine and one of the wagons to the place of discharge, intending to return for the other wagons in due course. The fireman uncoupled the remaining wagons and scotched them to prevent them running down the incline. One of the wagons broke away, ran down the incline, and killed a workman in the service of the same employers. There was evidence that the method of scotching adopted was unsafe and was known to and approved by the engine-driver. The representative of the deceased having brought an action for compensation against the employers:—

Held, reversing the decision of the Queen's Bench Division and the Court of Appeal, that there was evidence for the jury that the death was caused by reason of the negligence of a person who had the charge or control of a train within the meaning of the Act, since either the engine-driver had the charge or control, or the fireman had, and there was evidence of negligence in both. MCCORD *v.* CAMMELL AND COMPANY 57

—— Liability of law agent for - - 409
See SCOTTISH LAW. 6.

—— Stamp of larger amount than necessary 514
See BILL OF EXCHANGE.

NEW SOUTH WALES—Laws of.
See PRIVY COUNCIL APPEALS. 10—16.

NEW TRIAL — Misdirection — "Substantial wrong or miscarriage" - - 44
See LIBEL.

NON-SUIT—Fire insurance—Compliance with condition in policy - - - 372
See PRIVY COUNCIL APPEALS. 14.

NOTICE—Effect of recitals in deed—Estoppel
See PRIVY COUNCIL APPEALS. 19. 587

NOVA SCOTIA—Laws of.
See PRIVY COUNCIL APPEALS. 3, 4.

ONTARIO—Laws of Canada.
See PRIVY COUNCIL APPEALS. 5, 6.

PARLIAMENT—Allowances to members—Construction of Act - - - 376
See PRIVY COUNCIL APPEALS. 15.

PARTIES — Joinder of defendants — Separate causes of action - - - 450
See PRACTICE. 1.

PARTNERSHIP—Sale of goodwill—Canvassing old customers - - - 7
See GOODWILL.

PATENT—*Disclaimer—Revocation—Patent Act* 1883 (46 & 47 *Vict. c.* 57) *ss.* 19, 26.

Where on a petition for revocation of a patent the judge holds that all the claims are bad and orders the patent to be revoked and this order is entered on the Register of Patents, the Court of Appeal, if it is of opinion that one claim is valid, may reverse the order below and order that the patent be revoked, unless within three months, or such further time as the Court may allow, the patentee obtain leave to amend his specification by disclaiming all the claims except the valid one. DEELEY *v.* PERKES - - - 496

POOR LAW—*Guardians—Limitation of Time for Payment of Debt—Jurisdiction of House of Lords over Costs—Costs of Appeal in House of Lords—Poor Law (Payment of Debts) Act* 1859 (22 & 23 *Vict. c.* 49) *ss.* 1, 4.

An order of this House for payment of the costs of an appeal without specifying the amount does not constitute a "debt, claim or demand lawfully incurred or become due" within the meaning of the Poor Law (Payment of Debts) Act 1859 ss. 1, 4, until the amount had been certified by the Clerk of the Parliaments under the Standing Orders, and the time for payment limited by that Act runs from the date of the certificate and not from the date of the order.

This House has an inherent jurisdiction, independent of statute, over costs in proceedings before itself.

The decision of the Court of Appeal ([1895] 1 Q. B. 662) reversed. GUARDIANS OF WEST HAM UNION *v.* CHURCHWARDENS, &C., OF ST. MATTHEW, BETHNAL GREEN - - - - 447

POOR-RATE—*Appeal—Consent of Guardians—Assessment Committee as Respondents—Costs—Union Assessment Committee Amendment Act* 1864 *c.* 39 *s.* 2.

Where the assessment committee of a union receive notice of a poor-rate appeal under s. 1 of the Union Assessment Committee Amendment Act 1864, they have no authority to appear as

POOR-RATE—*continued.*
respondents to the appeal unless they obtain the consent of the guardians after sending notice to every guardian, as required by s. 2. If they do appear without such consent and the appeal is dismissed "with costs to the respondents" they are not entitled to costs, although throughout the proceedings they receive notices to attend from the appellants and are treated by them as respondents.

The decision of the Court of Appeal ([1895] 1 Q. B. 38) affirmed. WEST HAM UNION *v.* JUSTICES OF ESSEX AND LONDON COUNTY COUNCIL 443

2. —— *Exemption—Society instituted for purposes of the Fine Arts exclusively—"Voluntary Contributions"—6 & 7 Vict. c.* 36, *s.* 1.

A society is not "supported by voluntary contributions" within the meaning of 6 & 7 Vict. c. 36, s. 1, when it returns to every contributor the equivalent of his contributions in money's worth. "Voluntary" as there used does not mean not compulsory; it means gratuitous, without any money or other merely material consideration.

The decision of the Court of Appeal ([1894] 2 Q. B. 609) reversed and the decision of Wright and Collins JJ. restored. OVERSEERS, &C., OF THE SAVOY *v.* ART UNION OF LONDON - - 296

PORT—Liability to clear a port of sunken ship *See* PRIVY COUNCIL APPEALS 21. 579

PRACTICE—*Parties—Defendants, Joinder of—Separate Causes of Action—Claim for Damages—Injunction—Order XVI. r.* 4.

Claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one action.

In an action against two defendants the statement of claim alleged that each of the defendants by their several acts, and that the defendants by their combined acts, obstructed the plaintiff's access to his premises, and claimed damages against them and each of them and an injunction:—

Held, that the action could not be maintained in this form and that one of the defendants must be struck out.

The decision of the Court of Appeal ([1895] 2 Q. B. 688) affirmed.

Quære whether the action could have been maintained if an injunction only had been claimed. SADLER *v.* GREAT WESTERN RAILWAY COMPANY - - - - - 450

2. —— *Sequestration—Discretion—Non-payment of Costs—Procedure—Order XLIII. r.* 7.

When application is made for leave to issue a sequestration for non-payment of costs the Court or judge should be satisfied that the application is reasonable, but it is not necessary to point to any particular property which may be made available for the payment of the costs by sequestration.

When the Court or judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior Court unless it is shewn that there has been an improper exercise of the discretion or some miscarriage of justice. HULBERT *v.* CATHCART - - - - 470

PRACTICE—*continued.*

3. —— *Special Case—Proceedings extra Cursum Curiæ—Appeal—Jurisdiction—Rules of the Supreme Court, Order XXXIV., r.* 1.

Where a special case is calculated and intended to raise for decision questions of fact only, the proceedings are extra cursum curiæ, the judgment of the Court is in the nature of an arbitrator's award, and an appeal cannot be entertained if its competency is objected to by the party holding the judgment. If in these circumstances the Court of Appeal reverses the judgment below, this House has no jurisdiction except to reverse as incompetent the judgment of the Court of Appeal. BURGESS *v.* MORTON - - 136

—— "Step in proceedings"—Application for extension of time - - - 1
See ARBITRATION.

PRIVY COUNCIL APPEALS — AUSTRALIA (WESTERN)—44 *Vict. No.* 10—*Rules and Orders, Order XXXVI., No.* 10—*Banker and Customer—Forged Cheques—Liability of Bank.*

Order XXXVI., No. 10, of the rules under 44 Vict. No. 10, does not empower the Court to give judgment in disregard of findings of the jury not objected to, merely because it sets aside one or more findings which have been objected to.

Where the effect of the former was that certain entries debited by the bank to their customer were in respect of cheques forged by one of its servants, that the customer was first informed thereof by the accredited agent of the bank who requested his silence, and that the customer in complying with that request acted honestly and with a view to what he believed to be the bank's interest:—

Held, that the silence of the customer was not a legal wrong to the bank, and that he was not estopped from relying on the forgery.

M'Kenzie v. *British Linen Co.* (6 App. Cas. 82) distinguished. OGILVIE *v.* WEST AUSTRALIAN MORTGAGE AND AGENCY CORPORATION - 257

2. —— **CANADA**—*British Columbia—Mines and Minerals—Precious Metals—Free Miner's Certificate—Construction—Law of British Columbia—Act* 47 *Vict. c.* 14, *s.* 3—*Act* 54 *Vict. c.* 26.

By s. 3 of the British Columbia Act (47 Vict. c. 14), land was granted to the Dominion Government, the appellant company's predecessor in title, "including all mines, minerals and substances whatsoever thereupon, therein, and thereunder":—

Held, in an action for wrongful ejectment by the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 Vict. c. 26), applicable to a part of the land granted, that he was entitled to mine for gold and other precious metals thereon, the above words not being sufficiently precise to transfer to the appellants' predecessor the right of the provincial legislature to administer the precious metals in the lands assigned. ESQUIMALT AND NANAIMO RAILWAY COMPANY *v.* BAINBRIDGE - - 561

3. —— *Nova Scotia—Jurisdiction of Provincial House of Assembly—Immunities of its Members — Order of Imprisonment — Revised Statutes, 5th Series, c.* 3—*Law of Nova Scotia.*

The Nova Scotia House of Assembly has

PRIVY COUNCIL APPEALS—CANADA—*contd.*
statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment.

In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment:—

Held, that the sections of the local Revised Statutes, 5th Series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are intra vires of the local legislature, as relating to the constitution of the province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognised by the Act of 1867, s. 88.

Barton v. *Taylor* (11 App. Cas. 197) distinguished. FIELDING *v.* THOMAS - - 600

4. —— *Nova Scotia — Licence—Application for Renewal—Effect of Repeal of Section authorizing Renewal—Revised Statutes, 5th Series, c. VII., s.* 95.

The appellants having obtained a licence to work for two years under s. 95, c. VII., of the Revised Statutes, 5th Series, afterwards applied under the same section for a renewal thereof; but in the meantime s. 95 had been repealed by an amending Act of 1889:—

Held, that at the date of the application to renew the power to grant it was gone, for even if the amending Act were so construed as not to interfere with vested rights, the appellants possessed a privilege and not an accrued right in reference to the renewal sought.

Main v. *Stark* (15 App. Cas. 384) referred to. REYNOLDS *v.* ATTORNEY-GENERAL FOR NOVA SCOTIA - - - - - - 240

5. —— *Ontario—Liquor Laws—Power of Prohibition — Distribution of Legislative Powers — British North America Act, ss.* 91, 92—*Canada Temperance Act*, 1886—*Ontario Act* (53 *Vict. c.* 56), *s.* 18.

The general power of legislation conferred upon the Dominion Parliament by s. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c. 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada;

Russell v. *Reg.* (7 App. Cas. 829) followed;

but not as regulating trade and commerce within s. 91, sub-s. 2, of the Act of 1867;

Citizens' Insurance Co. v. *Parsons* (7 App. Cas. 98) distinguished and *Municipal Corporation of Toronto* v. *Virgo* ([1896] A. C. 93) followed.

Held, also, that the local liquor prohibitions authorized by the Ontario Act (53 Vict. c. 56), s. 18, are within the powers of the provincial legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886. ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR THE DOMINION - 348

6. —— *Ontario—Trade—Power to Regulate a Trade does not include power to prohibit—By-laws — Construction — Ontario Revised Statutes*, 1887, *c.* 184, *s.* 495 (3).

A statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner:—

So *held*, where, under c. 184 of Revised Statutes of Ontario, 1887, s. 495 (3), a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised. MUNICIPAL CORPORATION OF THE CITY OF TORONTO *v.* VIRGO - - 88

7. —— *Railways — Imported Steel Rails — Street Railways—Tramways—Law of Canada—Construction—Dominion Act* (50 *&* 51 *Vict. c.* 39), *s.* 1, *item* 88; *s.* 2, *item* 173.

Although there may be in various Canadian Acts and for other purposes substantial distinctions between railways or railway tracks and street railways and tramways, yet, for the purpose of separating free and dutiable articles, such distinction is not maintained in Canadian Act 50 & 51 Vict. c. 39, and its three predecessors.

According to the true construction of that Act (see s. 1, item 88, and s. 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended. TORONTO RAILWAY COMPANY *v.* THE QUEEN - - - - 551

8. —— JAMAICA — *Trade-mark — Registration of Trade Marks Law*, 1888—"*Club Soda*"—*Alleged Misrepresentation of his Goods by the Plaintiff.*

In an action by the appellant who had registered his English trade-mark of "Club Soda" in Jamaica, under Law 17 of 1888, it appeared that the respondents persisted in selling their goods under the same name in a way calculated to deceive:—

Held, that the appellant was not disentitled to relief merely because he had printed on his label the words "manufactured in Ireland by

PRIVY COUNCIL APPEALS—JAMAICA—*contd.*

H.M. Royal Letters Patent." Those words, explained by the evidence to relate to patented machinery, did not necessarily represent or induce belief contrary to the fact that the ingredients of their article were patented. COCHRANE *v.* MACNISH & SON - - - - 225

9. —— NATAL—*Watercourse—Right to Construct—Right to divert Streams—Grant of Land—Construction of Reservation.*

Where in a grant of land a right is reserved to make watercourses over it for the public use and benefit by order of Government:—

Held, that such reservation may include, and in the circumstances of this case did include, a right to divert water from streams in the land and to use the water so diverted. REMFRY *v.* SURVEYOR-GENERAL OF NATAL - - 558

10. —— NEW SOUTH WALES—*Civil Servants of the Crown—Power to dismiss at pleasure—Law of New South Wales—Civil Service Act*, 1884 (48 *Vict. No. XXIV.*).

The Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided:—

But *held*, that certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the officer, are inconsistent with such a condition, and consequently restrict the power of the Crown in that respect. GOULD *v.* STUART 575

11. —— *Company—Contract—Shares deemed to be fully paid up—Liability—Law of New South Wales—Companies Act*, 1874, *No.* 19, *s.* 57—*English Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Where the members of a syndicate resolved to form a company, distributing the shares therein rateably amongst themselves according to the extent of their interests in the syndicate property, the same to be deemed in great part paid up, and a deed of sale of their property was executed by their trustees to a trustee for the company, afterwards filed with the registrar and adopted by the directors, which embodied the above resolution:—

Held, that the deed of sale was not a contract within the meaning of s. 57 of the Colonial Act of 1874, corresponding with s. 25 of the English Companies Act of 1867, so as to protect the shares from liability to calls in respect of the amounts which were to be deemed as paid up. It did not effect a genuine transfer of property in respect of which shares deemed to be paid up formed part of the consideration; nor were any legal rights or liabilities created thereby.

Hartley's Case (L. R. 10 Ch. 157) distinguished. SMITH *v.* BROWN - - - 614

12. —— *Contract of Indemnity—Estoppel—Evidence as to abandonment of Claim.*

The plaintiff and defendant jointly guaranteed to a bank payment of a certain cash bond, the plaintiff agreeing with the defendant to indemnify him from all liability thereunder. Seven years afterwards the bank released the

PRIVY COUNCIL APPEALS—NEW SOUTH WALES—*continued.*

guarantors from liability on payment by each of 1000*l.*

In a suit by the plaintiff to declare the agreement of indemnity discharged, and to restrain the defendant from continuing his action thereon:—

Held, that in the absence of a contract to discharge it, the defendant could not be estopped from enforcing it by any representation, express or implied, of his intention to abandon it. To raise an equity on behalf of the plaintiff there must have been misrepresentation of existing facts.

Jordan v. *Money* (5 H. L. C. 185) approved. CHADWICK *v.* MANNING - - - 231

13. —— *Costs—Consultations with Counsel—Shorthand notes of Evidence—Expenses of Witnesses.*

Where a taxing master had directed (1.) that fees for consultations should be ascertained by the number of consultations allowed, (2.) that costs of witnesses should be ascertained at a uniform rate of fourteen days' subsistence when the witness was examined twice, and seven days when examined only once:—

Held, that the first direction was right, and that the master need not inquire into the length of the consultations and the importance of the occasions on which they were held, but that the second direction was erroneous, for that the case of each witness properly called should be considered, and a reasonable allowance made having regard to the character of his evidence and the probability of his having to be recalled. COMMISSIONER FOR RAILWAYS *v.* O'ROURKE - 594

14. —— *Insurance, Fire—Compliance with Condition in Policy—Non-suit—Practice.*

Where, in an action on a fire policy, the plaintiffs' evidence shewed that they could have complied with the condition as to giving within fifteen days a detailed account of their loss "as the nature and circumstances of the case will admit" much more fully and completely than they had done:—

Held, that they were rightly non-suited, since even if the question of compliance were for the jury, a verdict could not have been reasonably given in their favour. HIDDLE *v.* NATIONAL FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND - - - - - - 372

15. —— *Parliamentary Allowances to Members—Law of New South Wales—53 Vict. No.* 12, *s.* 2—*Construction.*

According to the true construction of the Parliamentary Representatives' Allowance Act (53 Vict. No. 12), s. 2, an annual grant to "every member of the Legislative Assembly now serving or hereafter to serve therein," applies to every successive Legislative Assembly of the colony, and is not limited to the particular Assembly existing at the date of the Act. ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* RENNIE 376

16. —— *Rate—Levying Water-rate—Lands outside Rateable Limit—By-laws—Act XXVII. of* 1892, *s.* 35—*Construction.*

Where the appellants were authorized by their incorporating Act (XXVII. of 1892), s. 35, to

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

make by-laws levying a water rate "in respect of lands and tenements distant not more than sixty yards from any main . . . . although such lands or premises are not actually connected with any main":—

Held, that they had no authority to levy a rate on lands without the prescribed limit merely because such lands formed one holding with other lands within the prescribed limit. HUNTER DISTRICT WATER SUPPLY AND SEWERAGE BOARD *v.* NEWCASTLE WALLSEND COAL COMPANY - 82

17. —— **QUEENSLAND**—*Insurance—Remedies of Insurers—Effect of Payment under Policy—Subrogation—Queensland Act* (40 *Vict. c.* 84), *s.* 5, *sub-s.* 6.

Payment honestly made by insurers in satisfaction of a claim by the insured entitles the insurers to the remedies available to the insured; and such remedies cannot be resisted on the ground that the payment was not within the terms of the policy:—

Held, that although the insurers could not by mere force of subrogation sue in their own name, yet that in this case the right to do so was conferred by assignment from the insured aided by s. 5, sub-s. 6, of the Judicature Act (40 Vict. c. 84), corresponding with the English Judicature Act of 1873. KING *v.* VICTORIA INSURANCE COMPANY - - - - 250

18. —— **TASMANIA** — *Practice — Special Leave to Appeal—Tasmanian Act No.* 10 *of* 1858, *ss.* 5, 8.

By Tasmanian Act No. 10 of 1858, s. 5, disputes concerning lands yet ungranted by the Crown are referred to the Supreme Court, whose decision is to be final; and by s. 8 the Court is directed to be guided by equity and good conscience only, and by the best evidence procurable, even if not required or admissible in ordinary cases, and not to be bound by strict rules of law or equity or by any legal forms:—

Held, that the Crown's prerogative to grant special leave to appeal is inapplicable to a decision so authorized.

Théberge v. *Laundry* (2 App. Cas. 102) followed. MOSES *alias* MOSS *v.* PARKER. *Ex parte* MOSES - - - - - - 245

19. —— **TRINIDAD AND TOBAGO**—*Vendor and Purchaser—Purchaser for Value with Notice—Effect of Recitals in Deed—Notice—Estoppel.*

Recitals in a deed are not representations of fact on the faith of which a stranger to the deed is entitled to act without inquiry.

Where the plaintiff, a purchaser of a legal estate, had express notice that the defendants obtained possession of the land bought under a deed which purported to convey to them an equitable title thereto:—

Held, that he must convey the legal estate to the defendants. Erroneous recitals in the deed as to the derivation of the equitable title actually transferred did not estop the defendants or vitiate the notice. TRINIDAD ASPHALTE COMPANY *v.* CORYAT - - - - - 587

20. —— **VICTORIA**—*Probate—Statement by Executors—Debts chargeable on Foreign Assets—*

PRIVY COUNCIL APPEALS—VICTORIA—*contd.*

Law of Victoria—Administration and Probate Act, 1890, *No.* 1060, *s.* 97, *sub-s.* 2.

Held, that, under s. 97, sub-s. 2, of the Administration and Probate Act of 1890, the statement which an executor is required to furnish relates to all assets within the Colony of Victoria, and to such debts as are properly chargeable on these Colonial assets in assessing them for duty so as to shew the assessable balance in the Colony.

Consequently, where the testator was domiciled in Victoria but had foreign assets, these latter, to which Victorian probate gives no title, need not be stated, nor any debts chargeable thereon except so far as they are in excess of the security, and to the extent of that excess are chargeable on the Victorian assets.

Blackwood v. *Reg.* (8 App. Cas. 82) followed. HENTY *v.* THE QUEEN - - - 567

21. —— *Ship—Liability to clear a Port of Sunken Ship—Registered Owners—Law of Victoria—Marine Act*, 1890, *No.* 1565, *s.* 13.

Sect. 13 of the Victorian Marine Act, 1890, differing in that respect from s. 56 of the English Harbours, Docks, and Piers Clauses Act, 1847, imposes, according to its true construction, upon the owner or master of any ship sunken within a port, the duty of clearing the port thereof, or of reimbursing the statutory officer the expenses incurred by him for that purpose:—

Held, that the registered owner of the ship at the date of the occurrence cannot escape liability by abandoning the wreck to the underwriters, who, although they become at common law owners of the wreck, are not within the terms of the section.

The Crystal ([1894] A. C. 508) distinguished. HOWARD SMITH & SONS *v.* WILSON - 579

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REVENUE—*Income Tax—Company resident in United Kingdom — Trade carried on partly in United Kingdom, partly Abroad—"Foreign Possessions"—5 & 6 Vict. c. 35 s. 100 Sched. D. First and Fifth Cases.*

Where a trade is carried on either wholly in the United Kingdom or partly within and partly outside it, and profits accrue therefrom to a person or a corporation residing in the United Kingdom, the assessment for income tax falls under the First Case of Sched. D. of 5 & 6 Vict. c. 35 s. 100, and does not fall under the Fifth Case, and the duty is to be computed upon the full amount of the balance of the profits or gains of the trade, and not only upon the actual sums annually received in the United Kingdom. A company registered under the Companies Acts, whose registered office was in England, were the proprietors of a railway in Brazil. The working of the railway was under the control and direction of, and the business of the company was managed by, the directors in England. The directors purchased in England and sent out to Brazil the materials and plant necessary for the purposes of the railway. The accounts were kept and the balance-sheets and reports were made out in London, where also the meetings were held, and all dividends were declared and paid. With the exception of certain small amounts for transfer fees and annual interest on money, the whole revenue of the company arose from moneys paid to them in Brazil for the carriage of passengers and goods on the railway and for other matters connected with the railway:—

Held, that it was not necessary to decide the question whether the business of the company was carried on wholly in the United Kingdom, since it was clearly carried on partly in England and not (as in *Colquhoun* v. *Brooks* (14 App. Cas. 493)) wholly outside the United Kingdom; and that the company were therefore assessable to income tax, under the First Case of Sched. D of 5 & 6 Vict. c. 35, s. 100, upon the full amount of the balance of the profits or gains of their business, and not, under the Fifth Case, only upon the actual sums annually received in the United Kingdom. The decision of the Court of Appeal ([1895] 1 Q. B. 580) affirmed. SAN PAULO (BRAZILIAN) RAILWAY COMPANY *v.* CARTER 31

2. —— *Income Tax — Exemption — Public Library—Urban Authority—"Building the Property of a Literary or Scientific Institution"—Public Libraries Act* 1892 (55 & 56 *Vict. c.* 53) *ss.* 4, 11, 12, 14—*Income Tax Act* 1842 (5 & 6 *Vict. c.* 35) *s.* 61 *No. VI.*

The exemption from income tax granted by the Income Tax Act 1842 (Sched. A s. 61 No. VI.) to any building "the property of any literary institution" includes buildings appropriated to free public libraries and used solely for the purposes of the libraries, whoever may be the owners of the buildings, and whether they are or are not supported by rates.

So *held* with regard to the Manchester free public libraries, and the decision of the Court of Appeal ([1895] 1 Q. B. 673) reversed, Lord Halsbury L.C. dissenting. MAYOR, &c., OF MANCHESTER *v.* MCADAM - - - - 500

3. —— *Income Tax—Trade exercised within United Kingdom—Assessment in Name of Agent—"Factor, Agent, or Receiver having the Receipt of Profits or Gains"—Income Tax Act* 1853 (16 & 17 *Vict. c.* 34) *Sched. D—Income Tax Act* 1842 (5 & 6 *Vict. c.* 35) *ss.* 41–44.

A foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country.

This principle applied to the business of Roederer of Reims, wine merchant, and the decisions of the Queen's Bench Division and Court of Appeal ([1895] 1 Q. B. 71) reversed (Lord Morris dissenting).

Semble: the words in the Income Tax Act 1842 s. 41 "having the receipt of any profits or gains" apply to "factor" and "agent" as well as to "receiver." GRAINGER & SON *v.* GOUGH (SURVEYOR OF TAXES) - - - 325

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SCOTTISH LAW — *Misrepresentation — Credit — Pleading—Mercantile Law (Scotland) Amendment Act*, 1856 (19 & 20 *Vict. c.* 60), *s.* 6.

By s. 6 of the Mercantile Law (Scotland) Amendment Act, 1856, it is provided inter alia that "All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods," &c., "shall be in writing and shall be subscribed by the person . . . . making such representations and assurances, or by some persons duly authorized by him or them, otherwise the same shall have no effect."

The pursuers alleged that the defendants' agent, knowing that D., R. & Co., customers of the defenders, were largely indebted to the defenders' bank and were insolvent, conceived a fraudulent design of obtaining the pursuers' acceptances in favour of D., R. & Co., in order to apply them pro tanto in reducing D., R. & Co.'s debt to the defenders' bank. That in pursuance of this fraudulent scheme, D., R. & Co. applied to the pursuers for accommodation, and referred them to the defenders' agent, who falsely assured the pursuers, First, that D., R. & Co. were in a thoroughly sound condition financially and only required temporary accommodation; secondly, that the sum due to the defenders' bank was very trifling; thirdly, that D., R. & Co. had made up the losses which they had sustained through another company; and fourthly, that no portion of the proceeds of any acceptances by the pursuers would be applied in extinction of the bank's debt or of any obligation to them. That in reliance on these assurances the pursuers granted acceptances to D., R. & Co., which were applied to the credit of D., R. & Co.'s banking account with the defenders. D., R. & Co. were sequestrated, and the pursuers, as the bills fell due, were compelled to pay them. All the representations relied on were made orally:—

Held (reversing the decision of the Second Division), that there was no cause of action, for as to the three first allegations, which undoubtedly came within the Act, the terms of s. 6 were comprehensive and imperative that no oral representations made with the intent specified in the section should be of any legal effect, however false and fraudulent; and secondly, assuming that the fourth representation was independent of the statute, there was no relevant allegation that the bank did not give full effect to the alleged representation of their officer. CLYDESDALE BANK *v.* PATON - - - 381

2. —— *Salmon Fishings—Boundary—Fishings ex adverso Glebe Land.*

Where in a pending cause it appears that the Crown has a primâ facie claim to the salmon fishings in dispute, the Court ought to direct intimation to be made to the Crown authorities; and stay the action pending their decision to appear or bring a separate action.

The pursuer's lands of Ardoe and the defender's lands of Banchory marched inland, and were both bounded by the River Dee. But at the river there was interjected between these two estates the glebe of Banchory-Devenick, which extended along the river front 350 yards. The

SCOTTISH LAW—*continued.*

minister had no title to the salmon fishings. The titles of Ardoe and Banchory included the salmon fishings "belonging to" the lands; but these titles contained no express grant to the fishings ex adverso the glebe. The pursuer admitted that the defender had an exclusive right to the fishings eastward from a drain leading to the river from the offices of the manse, but he claimed the exclusive right from the east march of Ardoe up to the same drain, a space of 135 yards. The defender maintained that the fishings in question belonged to him, as being ex adverso of his lands of Kirkton of Banchory:—

Held, reversing the decision of the First Division of the Court of Session, that it was a matter of reasonable inference from the proof that the glebe included no part of the lands of Kirkton, but did include portions of Banchory and Ardoe, and that the disputed fishings remained with Ardoe. OGSTON *v.* STEWART - - 120

3. —— *Satisfaction—Covenant to Pay Sum of Money—Legacy of same Amount—Portions to Children — Maxim, "Debitor non præsumitur donare."*

The English rule against double portions to children does not obtain in Scotland.

In an ante-nuptial marriage settlement made on the marriage of his adopted daughter the testator covenanted that his executors should within six months after his death pay the marriage contract trustees 4000*l.* with interest at the rate of 4 per cent. from his death, to be held on trusts declared by reference to the trusts of the adopted daughter's property; with the exception that on the failure of children of the marriage, before the period of vesting, the 4000*l.* should be held on trust for the testator absolutely. By the marriage contract the adopted daughter assigned to her trustees all after-acquired property. Subsequently the testator, by his trust disposition and settlement, among other "legacies and annuities" directed his trustees to pay "a legacy of 4000*l.*" to his said adopted daughter, "who shall be allowed interest at 5 per cent. on that sum so long as she shall prefer to allow it to remain as part of the share in the indigo concern":—

Held, affirming the judgment of the Second Division of the Court of Session, that by Scottish law there was no presumption that the 4000*l.* given by the will was intended by the testator to be in satisfaction of the 4000*l.* covenanted to be paid by the marriage settlement, and that the proper inference was that the legacy was given by him as an additional benefit. JOHNSTONE *v.* HAVILAND - - - - - 95

4. —— *Succession*—"*Heirs female*"—*Trust Disposition.*

A truster in the narrative of his trust disposition stated that, "in order to make and secure additional provisions" for his second son "and the other heirs of entail succeeding to him in" the lands and estate of C., to "enable them to support the dignity and title of Earl of C.," he thereupon conveyed to trustees certain securities. In the dispositive portion of the deed it was declared, "that these presents in favour of my said trustees are granted in trust for the uses ends

SCOTTISH LAW—*continued.*

and purposes . . . . and under the conditions provisions and declarations after written." Then, fourthly, he directed his trustees after his death to pay the free proceeds of the trust funds to his second son and the heirs male of his body; whom failing, to certain substitutes; "whom failing, to the heirs female of the body" of his second son. The second son succeeded to the estate, and died, leaving issue only two daughters, of whom the eldest succeeded to the estate, and was declared by Royal Letters Patent to succeed her father in the title and estate of C.:—

Held (reversing the decision of the Second Division), that the daughters divided the income because "heirs female" meant in Scottish law heirs portioners who took as a class; and that the narrative could not control the directions of the deed. MACKENZIE *v.* DUKE OF DEVONSHIRE 400

5. —— *Superior and Vassal—Obligation in Feu Charter to rebuild—Disposition of Feu after Obligation has become enforceable—Conveyancing (Scotland) Act*, 1874 (37 & 38 *Vict. c.* 94), *s.* 4, *sub-s.* 2.

A proprietor by feu-contract disponed certain subjects to a company "and its successors and assignees whomsoever" under the condition (inter alia), "That the company and its foresaids" should be bound to erect buildings suitable for a hydropathic establishment of not less value than 15,000*l.* and to uphold buildings of that value in all time coming, and to keep the same insured against fire to the extent of not less than that sum, and in case the said buildings should be destroyed by fire, to rebuild the same so as to maintain the total value of 15,000*l.* Buildings were erected of the stipulated value, and insured. The company sold the subjects to the first-named appellants. On November 7, 1893, the buildings were destroyed by fire, and on the 27th of the same month the superior, the respondent, raised an action against the first appellants for performance of the obligation to rebuild. Before defences were lodged the first appellants, by a duly recorded disposition, conveyed the subjects to the second appellants, who subsequently conveyed them to one John Wilson. All these were thereafter made parties to the action.

The first appellants then pleaded that, as they were no longer vassals in the feu, they were not liable in the performance of the obligation.

The First Division of the Court of Session decided that the obligation, having become prestable during the first appellant's tenure, continued to be binding upon them; and (2.) that all the defenders were jointly and severally liable to rebuild in respect that the obligation was a condition of the grant remaining unfulfilled during the respective periods of their tenure of the subjects (22 Rettie, 954).

Upon appeal to the House of Lords the appellants, after argument, consented that the appeal should be dismissed. CALLANDER AND TROSSACHS HYDROPATHIC COMPANY AND THE EAGLE PROPERTY COMPANY *v.* MARSHALL - - 223

6. —— *Testing Clause in Marriage Contract—Liability of Law Agent for Carelessness.*

A declaration inserted in the testing clause of a deed, which purports to affect or qualify any of the provisions in the body of the deed, has no legal effect.

Smith v. *Chambers* (5 R. 97) followed. BLAIR *v.* ASSETS COMPANY - - - - 409

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SHIP—*Carriage of Goods—Bill of Lading—Short Delivery—Burden of Proof.*

A shipowner is bound to deliver the full amount of goods signed for by the master in a bill of lading, unless he can prove that the whole or some part of it was in fact not shipped.

In an action for freight for the conveyance of 1000 bales of jute against the appellants, onerous indorsees of the bills of lading, the appellants claimed to retain the value of twelve bales short delivered of the 1000 shewn by the bills of lading signed by the master to have been shipped at the port of loading. There was no clear evidence as to how or where the missing bales had disappeared:—

Held (reversing the Court of Session), that there was nothing to displace the evidence supplied by the bills of lading that the missing bales had been received on board the vessel, and that the appellants were entitled to the deduction claimed by them. SMITH & CO. *v.* BEDOUIN STEAM NAVIGATION COMPANY - - 70

2. —— *Charterparty—Damages by way of Demurrage—Lay Days—Judicature (Scotland) Act*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.

By charterparty it was provided that the *River Ettrick* should proceed to Bo'ness and receive a cargo of coal, to be supplied by the charterers, and brought alongside within sixty running hours, demurrage to be paid at a specified rate, "lay days to count from the time the master has got ship reported berthed and ready to receive cargo, and given notice of the same in writing to the charterers." On October 17 the shipowner informed the charterers that the *River Ettrick* had left Harwich for Bo'ness, and asked them to supply cargo for October 19. On October 19, at 8.30 A.M., the ship arrived in the roads of Bo'ness, but in consequence of the crowded state of the docks she was not allowed to enter. Her arrival was wired to the charterers. On October 21 a loading berth became vacant owing to the cargo of an earlier arrived vessel not being forward. If a cargo had been then ready for the *River Ettrick* she would have been allowed to enter the dock, but her cargo was not ready. Eventually, she was docked on the 26th, berthed for loading on the 27th, and sailed on October 28.

The shipowner recovered from the charterers,

SHIP—*continued.*
in an action raised in the Sheriff Court, Scotland, damages by way of demurrage for the detention of the ship from October 21 until the time when the cargo was ready. Upon appeal to the Court of Session the judgment was reversed. The fact that there was a berth vacant on the 21st was not set out in the interlocutor of the Court of Session in accordance with the Scottish Judicature Act, 1825, but this fact was to be found in the opinion of the judge delivering judgment:—
Held, by the House of Lords, that to carry out the spirit of the Scottish Judicature Act all the facts ought to be found by the interlocutor appealed from; but, secondly, it made no difference in the result, for assuming the facts to be as found, the shipowner had no cause of action, for there was no obligation on the part of the charterers to have a cargo on the quay, ready for loading, on the off-chance of a berth becoming vacant. LITTLE *v.* STEVENSON & Co. 108
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STOCK EXCHANGE—*Gaming and Wagering Contract—Payment of "Differences"—Securities deposited as "Cover"—"To abide the Event"—Action to recover deposited Securities—Gaming Act*, 1845 (*8 & 9 Vict. c.* 109), *s.* 18.

Where both parties to contracts for the sale and purchase of stocks intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase and delivery or receipt (as the case may be) of the stocks, does not prevent them from being contracts by way of gaming and wagering within the Gaming Act 1845, c. 109 s. 18 and therefore void.

In such transactions securities deposited by one of the parties with the other to secure the payment of "differences" are not deposited "to abide the event" within the meaning of s. 18, and are recoverable by action.

The decision of the Court of Appeal ([1895] 2 Q. B. 329) affirmed. UNIVERSAL STOCK EXCHANGE *v.* STRACHAN - - - 166

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TRADE NAME—*Common Law Right—Name indicating Manufacturer—True Description of Article sold—Imitation—Tendency to Deceive—Fraud.*

A trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers (whether immediate or ultimate) into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods.

The plaintiff had for some years made belting and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting and nothing else. The defendant began to sell belting made of the yarn of camel's hair, and stamped it "Camel Hair Belting" so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavouring thus to pass off his goods as the plaintiff's:—

Held, that the plaintiff was entitled to an injunction restraining the defendant from using the words "camel hair" as descriptive of or in connexion with belting made or sold or offered for sale by him and not manufactured by the plaintiff without clearly distinguishing such belting from the plaintiff's belting.

The decision of the Court of Appeal ([1895] 1 Q. B. 286) reversed. REDDAWAY *v.* BANHAM 199

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Where a testator gives power to his trustees to appoint a factor to the estate who may be one of themselves, but directs them to require annual accounts, the trustees are guilty of culpa lata if they fail to call for annual accounts. CARRUTHERS *v.* CARRUTHERS - - - **659**

UNIVERSITY—*Affiliation and Incorporation of Colleges—Consent, Condition attached thereto—Ultra vires—Reduction—Jurisdiction—Universities (Scotland) Act*, 1889 (52 & 53 *Vict. c.* 55), *ss.* 15, 16, 21.

The Universities (Scotland) Act, 1889, s. 16, provides: "Without prejudice to any of the powers hereinbefore conferred, the commissioners" charged with the administration of the Scottish universities "shall with respect to the University of St. Andrews and the University College of Dundee have power to affiliate the said University College to and make it form part of the said university, with the consent of the University Court of St. Andrews, and also of the said college, with the object, inter alia, of establishing a fully equipped conjoint University School of Medicine. . . ." By s. 15, sub-s. 3, "The University Court, or any college which under this Act shall have been affiliated to the university, may respectively at any time thereafter resolve that such college shall cease to be affiliated to such university. . . ." By s. 21, "After the expiration of the powers of the commissioners, the University Court of each university shall have power to make such ordinances as they think fit with the approval of Her Majesty in Council . . . ." (2.) with respect to "Altering or revoking any of the ordinances affecting such university which have been or may be framed and passed under the Universities (Scotland) Act, 1858, or this Act, and making new ordinances."

An agreement purporting to be the consent

UNIVERSITY—*continued.*

required by s. 16 of the Act of 1889 contained, inter alia, a stipulation that the said union should, as regards duration, be permanent, and dissoluble only by Act of Parliament:—

Held, that the stipulation was not ultra vires, for ss. 15 and 21 give no power to revoke an affiliation of the nature of an incorporation which had the effect of merging the college into the university with a joint object:—

Held, also, differing from the decision of the Second Division of the Court of Session, that that Court had jurisdiction to decide the legal question notwithstanding the fact that the consent sought to be set aside was before the Universities Committee of the Privy Council in respect to a pending ordinance. MEDCALFE *v.* COX - **647**

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